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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1901~~ 1902.

No. ~~948~~ 117.

GEORGE BLEISTEIN, JOHN W. BRIDGMAN, JOHN A. RUDOLPH, ANSLEY WILCOX, GERRITT B. LANSING, AND EDWIN FLEMING, DOING BUSINESS UNDER THE NAME OF THE COURIER COMPANY AND THE COURIER LITHOGRAPHING COMPANY, PLAINTIFFS IN ERROR,

vs.

THE DONALDSON LITHOGRAPHING COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED JUNE 11, 1901.

(~~18,199.~~)

(18,199.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 346.

GEORGE BLEISTEIN, JOHN W. BRIDGMAN, JOHN A. RUDOLPH, ANSLEY WILCOX, GERRITT B. LANSING, AND EDWIN FLEMING, DOING BUSINESS UNDER THE NAME OF THE COURIER COMPANY AND THE COURIER LITHOGRAPHING COMPANY, PLAINTIFFS IN ERROR,

vs.

THE DONALDSON LITHOGRAPHING COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 26, 1902.

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TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals, for the Sixth Circuit.

George Bleistein, et al., Appellants,

vs.

Donaldson Lithographing Company, Appellee.

Stipulation of Counsel as to Printing of Record.

In the above entitled case it is hereby stipulated by the counsel of the parties thereto that the following parts of the record be not printed, to wit:

1st. Exhibits "A," "B," "C," "G," "H," "J," "K," and "L." The said exhibits being large circus posters and hand bills. Exhibits "N," "O," a photographic negative on glass and a print therefrom.

The original exhibits will be considered with the printed record.

2d. The order of claim and delivery and the marshal's return upon it on pages 74 to 77 transcript, because the same appears on pages 16 to 18 transcript.

3d. Notice to take depositions—stipulation as to same and caption to depositions on pages 82, 83, 84 and 85 transcript.

Certificate to depositions on pages 98, 99 and 100 transcript, because not material.

E. W. Kittredge,
Cobb & Howard,
Attys. for Donaldson Lithographing Co.
Wilcox & Miner,
Geo. T. Hogg,
Stallo, Richards & Shaw, and
C. J. & W. W. Helm,
Attorneys for Appellees.

819. Stipulation to print record. Filed Feb. 20, 1900. Frank O. Loveland, Clerk.

United States of America, District of Kentucky, ss.:

At a stated term of the Circuit Court of the United States of America, within and for the District of Kentucky, in the Sixth Judicial Circuit of the United States of America, begun and held at the Federal Court Hall in the city of Covington, Kentucky, in said district, on the first Monday of December, being also the 4th day of that month, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States of America, the one hundred and twenty-fourth.

Present: Hon. Walter Evans, sitting as Circuit Judge.

Among the proceedings had were the following, to wit:

George Bleistein, John Bridgman, John A. Rudolf, Ansley Wilcox, Gerrit B. Lansing and Edwin Fleming, doing business as The Courier Company and The Courier Lithographing Company, Plaintiffs,	At Law.
vs.	
The Donaldson Lithographing Company, Defendant.	

Be it remembered that heretofore, to wit, on the 10th day of June, A. D. 1899, came the plaintiffs, by their attorneys, and filed in the clerk's office of said court, their certain petition against the defendants herein. Said petition was and is in words and figures following, to wit:

Circuit Court of the United States, for the District of Kentucky.

George Bleistein, John Bridgman, John A. Rudolf, Ansley Wilcox, Gerrit B. Lansing and Edwin Fleming, doing business under the name of the Courier Company, and The Courier Lithographing Company, Plaintiffs,	Petition.
vs.	
The Donaldson Lithographing Company, Defendant.	

The plaintiffs above named, for their declaration, com-

plaint and petition in this action, allege upon information and belief:

I.

1. That the plaintiffs above named are citizens of the United States and of the state of New York and reside in Buffalo, Erie county, New York, and compose the unincorporated association known as the "Courier Company" and also known as the "Courier Lithographing Company," and that the defendant is a corporation organized under, and existing by virtue of, the laws of the state of Ohio.

2. That heretofore, and prior to the 11th day of April, 1898, said plaintiffs, under the name of the Courier Lithographing Company, designed and engraved a lithographic print, cut or engraving styled "Spectacular Ballet Design," for the purpose of vending the same, and thereafter, before the day of the first publication anywhere, and on the 11th day of April, 1898, deposited a printed copy of the title of the same as aforesaid, and filed a description and two copies thereof, in the office of the Librarian of Congress, at Washington, District of Columbia, pursuant to the provisions of the statutes of the United States, in such case made and provided, and such title was, on said day, recorded in the words following, to wit:

"1898, No. 22966. Library of Congress, to wit:

Be it remembered,

That on the 11th day of April, 1898, The Courier Litho. Co., of Buffalo, N. Y., hath deposited in this office the title of a lithograph, the title or description of which is in the following words, to wit:

Spectacular Ballet Design.

Description on file.

The right whereof it claims as proprietor in conformity with the laws of the United States respecting copyrights.

John Russell Young,
Librarian of Congress.
By Thorvald Solberg,
Register of Copyrights.

Office of the Register of Copyrights, Washington, D. C."

3. That the plaintiffs claim, and have always claimed, the exclusive right to make and sell said lithographic print, cut or engraving, and have printed upon each and every copy made by the plaintiffs the provisions described by the statutes of the United States, to wit: "Copyright, 1898, Courier Litho. Co., Buffalo, N. Y."; that the defend-

ant, The Donaldson Lithographing Company, after the recording of the title of said Lithographic print, cut or engraving, and the filing of a description thereof, and contrary to the provisions of the act of Congress passed March 2, 1895, and constituting Section 4965 of the Revised Statutes of the United States as amended, and without the consent of the plaintiffs, the proprietors of the copyright above mentioned, fraudulently and knowing the same to be copyrighted, did reproduce, copy, print and publish such design or print, with the intent to deprive the plaintiffs of the benefits of their said copyright, and has sold large numbers of such reproduced print, cut or engraving, and now has in its possession and exposed for sale copies of said design, the actual number of which is unknown to the plaintiffs, but which they estimate at one hundred thousand, and the value of which, according to such estimate, does not exceed $600; that by reason of the premises and by force of the statutes of the United States, an action has accrued to the plaintiffs, and the defendant has forfeited to them, as the proprietors of said copyright, the plates on which it has reproduced said copyrighted article, together with all copies thereof, in the defendant's possession, and has forfeited to the plaintiffs and the United States one dollar for every sheet of the same found in its possession; that the plaintiffs are the owners, and entitled by reason of the facts aforesaid to the possession, of all of such plates and reproduced prints; that said plates and prints were made, and are now detained and held, by the defendant wrongfully, fraudulently and unlawfully, and that the plaintiffs are entitled thereto.

II.

I. The plaintiffs refer to and repeat each and all of the allegations contained in paragraph No. 1 of the first cause of action, above set forth, and further allege upon information and belief:

2. That heretofore, and prior to the 11th day of April, 1898, said plaintiffs, under the name of the Courier Lithographing Company, designed and engraved a lithographic print, cut or engraving, styled "Stirk Family Design," for the purpose of vending the same, and thereafter, before the day of the first publication anywhere, and on the 11th day of April, 1898, deposited a printed copy of the title of the same as aforesaid, and filed a description and two copies thereof, in the office of the Librarian of Congress, at Washington, District of Columbia, pursuant to the provisions of the statutes of the United States, in such case

made and provided, and such title was, on said day, recorded in the words following, to wit:

"1898, No. 22959. Library of Congress, to wit:

Be it remembered,

That on the 11th day of April, 1898, The Courier Litho. Co., of Buffalo, N. Y., hath deposited in this office the title of a lithograph, the title or description of which is in the following words, to wit:

Stirk Family Design.

Description on file.

The right whereof it claims as proprietor in conformity with the laws of the United States respecting copyrights.

John Russell Young,
Librarian of Congress.
By Thorvald Solberg,
Register of Copyrights.

Office of the Register of Copyrights, Washington, D. C."

3. That the plaintiffs claim, and have always claimed, the exclusive right to make and sell said lithographic print, cut or engraving, and have printed upon each and every copy made by the plaintiffs the provisions prescribed by the statutes of the United States, to wit: "Copyright, 1898, Courier Litho. Co., Buffalo, N. Y."; that the defendant, the Donaldson Lithographing Company, after the recording of the title of said lithographic print, cut, or engraving, and the filing of a description thereof, and contrary to the provisions of the Acts of Congress passed March 2, 1895, and constituting Section 4965 of the Revised Statutes of the United States as amended, and without the consent of the plaintiffs, the proprietors of the copyright above mentioned, fraudulently and knowing the same to be copyrighted, did reproduce, copy, print and publish such design or print, with the intent to deprive the plaintiffs of the benefits of their said copyright, and has sold large numbers of such reproduced print, cut or engraving, and now has in its possession and exposed for sale copies of said design, the actual number of which is unknown to the plaintiffs, but which they estimate at fifty thousand, and the value of which, according to such estimate, does not exceed $300; that by reason of the premises and by force of the statutes of the United States an action has accrued to the plaintiffs, and the defendant has forfeited to them, as the proprietors of said copyright, the plates on which it has reproduced said copy-

righted article, together with all copies thereof in the defendant's possession, and has forfeited to the plaintiffs and the United States one dollar for every sheet of the same found in its possession; that the plaintiffs are the owners, and entitled by reason of the facts aforesaid to the possesion of all of such plates and reproduced prints; that said plates and prints were made, and are now detained and held, by the defendant wrongfully, fraudulently and unlawfully, and that the plaintiffs are entitled thereto.

III.

1. The plaintiffs refer to and repeat each and all of the allegations contained in paragraph No. 1 of the first cause of action, above set forth, and further allege upon information and belief:

2. That heretofore, and prior to the 18th day of April, 1898, said plaintiffs, under the name of the Courier Company, designed and engraved a lithographic print, cut or engraving styled, "Statuary Act Design," for the purpose of vending the same, and thereafter, before the day of the first publication anywhere, and on the 18th day of April, 1898, deposited a printed copy of the title of the same as aforesaid, and filed a description and two copies thereof, in the office of the Librarian of Congress, at Washington, District of Columbia, pursuant to the provisions of the statutes of the United States, in such case made and provided, and such title was, on said day, recorded in the words following, to wit:

"1898, No. 24345. Library of Congress, to wit:

Be it remembered,

That on the eighteenth day of April, 1898, The Courier Co., of Buffalo, N. Y., hath deposited in this office the title of a lithograph, the title or description of which is in the following words, to wit:

Statuary Act Design.

Description on file.

The right whereof it claims as proprietor in conformity with the laws of the United States respecting copyrights.

John Russell Young,
Librarian of Congress.
By Thorvald Solberg,
Register of Copyrights.

Office of the Register of Copyrights, Washington, D. C."

3. That the plaintiffs claim, and have always claimed, the exclusive right to make and sell said lithographic print, cut or engraving, and have printed upon each and every copy made by the plaintiffs the provisions prescribed by the statutes of the United States, to wit: "Copyright, 1898, Courier Litho. Co., Buffalo, N. Y."; that the defendant, the Donaldson Lithographing Company, after the recording of the title of said lithographic print, cut, or engraving, and the filing of a description thereof, and contrary to the provisions of the Acts of Congress passed March 2, 1895, and constituting Section 4965 of the Revised Statutes of the United States as amended, and without the consent of the plaintiffs, the proprietors of the copyright above mentioned, fraudulently and knowing the same to be copyrighted, did reproduce, copy, print and publish such design or print, with the intent to deprive the plaintiffs of the benefits of their said copyright, and has sold large numbers of such reproduced print, cut or engraving, and now has in its possession and exposed for sale copies of said design, the actual number of which is unknown to the plaintiffs, but which they estimate at fifty thousand, and the value of which, according to the estimate, does not exceed $300; that by reason of the premises and by force of the statutes of the United States an action has accrued to the plaintiffs, and the defendant has forfeited to them, as the proprietors of said copyright, the plates on which it has reproduced said copyrighted article, together with all copies thereof in the defendant's possession, and has forfeited to the plaintiffs and the United States one dollar for every sheet of the same found in its possession; that the plaintiffs are the owners, and entitled by reason of the facts aforesaid to the possession of all of such plates and reproduced prints; that said plates and prints were made, and are now detained and held, by the defendant wrongfully, fraudulently and unlawfully, and that the plaintiffs are entitled thereto.

Wherefore the plaintiffs pray for the process of this court to the end that all plates and copies of the prints made in violation of their copyrights, as hereinbefore set forth, be seized, forfeited and delivered to the plaintiffs (the value of which is estimated at $1200), and that the plaintiffs have judgment against the defendant for themselves and to the use of the United States in the sum of one dollar for each and every sheet of the lithographic prints, cuts or engravings reproduced, copies, printed and published, as herein set forth, found in the possession of the defendant, and which amount, as estimated by the

plaintiffs, to the sum of twelve thousand dollars ($12,000.00) and that the plaintiffs also have judgment for the costs of this action.

Wilcox & Miner,
Plaintiffs' Attorneys,
616 Ellicott Square, Buffalo, N. Y.
C. J. & W. W. Helm, of counsel,
Newport, Ky.

United States of America, District of Kentucky, County of Kenton, ss.:

John A. Rudolf, being duly sworn, says that he is one of the plaintiffs in this action; that he has read the foregoing declaration, complaint and petition and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

John A. Rudolf.

Subscribed and sworn to before me this 10th day of June, 1899.

Jos. C. Finnell, Clerk.

And on the same day, to wit, June 10th, A. D. 1899, there issued out of the clerk's office of said court, the following summons directed to the marshal of the district, and against the defendant herein; said summons was and is in words and figures following, to wit:

The President of the United States of America, to the Marshal of the Kentucky District—Greeting:

You are commanded to summon The Donaldson Lithographing Company to answer on the first day of the next December term, of the Circuit Court of the United States, for the District of Kentucky, to be held in the city of Covington, a petition filed against it in said court by George Bleistein, John W. Bridgman, John A. Rudolph, Ashley Wilcox, Gerritt B. Lansing and Edwin Fleming, doing business under the name of the Courier Company and the Courier Lithographing Company, and warn it that upon its failure to answer, the petition will be taken for confessed, or it will be proceeded against for contempt, and you will make due return of this summons on the first day of the next December Term of said court.

Witness Hon. Melville W. Fuller, Esq., Chief Justice of the Supreme Court of the United States, at Covington,

in the said District, this 10th day of June, in the year of our Lord 1899, and of our Independence the 123rd year.

Jos. C. Finnell, C. C. C., K. D.

And afterwards, to wit, June 13, A. D. 1899, came the marshal of the district to whom the aforesaid summons was in form directed, and returned the same into the clerk's office of said court with his proceedings herein endorsed in words and figures following, to wit:

"I hereby certify that I received this writ on the 10th day of June, 1899, and that I have personally executed the same by delivering to Wm. M. Donaldson, president of the Donaldson Lithographing Co., a true copy of the within writ on the 10th day of June, 1899, at his office in Newport, Ky.

A. D. James, U. S. Marshal.
By J. D. Compton, Deputy."

Fee	$2 00
Expense	10
	$2 10

And on the same day, to wit, on June 10, A. D. 1899, the plaintiffs by their attorneys, filed in the clerk's office of said court, their certain affidavit for order of claim and delivery. Said affidavit was and is in words and figures following, to wit:

Circuit Court of the United States, for the District of Kentucky.

George Bleistein, John W. Bridgman, Jno. A. Rudolph, Ansley Wilcox, Gerrit B. Lansing and Edwin Fleming, doing business under the name of the Courier Company, and the Courier Lithographing Company, Plaintiffs,	Affidavit.
vs.	
The Donaldson Lithographing Company, Defendant.	

United States of America, District of Kentucky, County of Kenton, ss.:

John A. Rudolf, being duly sworn, says that he is one

of the plaintiffs in this action and the secretary of the Courier Company and the Courier Lithographing Company, names under which the said plaintiffs do business. That the plaintiffs are owners and proprietors of the following lithographic prints, cuts or engravings, upon which they hold copyrights, to wit: "Spectacular Ballet Design," "Stirk Family Design," and "Statuary Act Design." That said copyrights were duly granted or issued, and recorded in the office of the Librarian of Congress pursuant to the statutes of the United States, and that the plaintiffs have complied with all the provisions of said statutes in reference thereto. That the defendant above named has, in violation of the statute of the United States, passed March 2, 1895, fraudulently and with intent to deprive the plaintiffs of the benefits of said copyrights, reproduced, copied, printed and engraved said copyrighted articles, and now have in their possession and exposed for sale large numbers of copies of said copyrighted articles and the plates or stones on which they were printed, and which are owned by virtue of the statute, and the rights of the plaintiffs in said copyrights, by the plaintiffs, and which ownership or interest is specially prescribed by the said statute; and that by virtue thereof the same are lawfully owned by the plaintiffs.

Affiant further says that said chattels are wrongfully, fraudulently and unlawfully detained by the defendant, and that the alleged cause of the detention thereof, according to the best knowledge, information and belief of the affiant, is the desire to vend the same and make a profit thereon, contrary to the rights of the plaintiffs.

Affiant further says that said chattels have not been taken by virtue of a warrant against the plaintiffs for the collection of a tax, assessment or fine against the plaintiffs, or under any order or judgment of a court of the United States or of any State against them, or seized under an execution against them, distress warrant or attachment against their property or any of them, and that the plaintiffs' cause of action has accrued within one year last past.

Affiant further says that the actual value of said chattels or lithographic prints, cuts or engravings, including the plates or stones (separate value of plates $30), on which they are made, is the sum of $5.75 per thousand sheets, and that the damages for the wrongful making and detention thereof by the defendant is prescribed by said statute of the United States to be $1.00 for each copy thereof found in the possession of the defendant, one-half to the plaintiffs and one-half to the United States.

Affiant further says that the plaintiffs are the owners and entitled to immediate possession of said chatteis described as follows: All plates or stones upon which lithographic prints, cuts or engravings have been reproduced and copied from or in imitation of the plaintiffs' copyrighted prints, cuts or engravings under the titles therein stated, together with all sheets of the reproduced articles so copyrighted found in the possession of the defendant, and estimated by the affiant at 200,000, to wit:

1. "Spectacular Ballet Design."
2. "Stirk Family Design."
3. "Statuary Act Design."

John A. Rudolf.

Subscribed and sworn to before me, this 10th day of June, 1899.

Jos. C. Finnell, Clerk.

And on the same day, to wit, June 10th, A. D. 1899, the plaintiffs, by their attorneys, filed in the clerk's office of said court their certain bond. Said bond was and is in figures following, to wit:

Circuit Court of the United States for the District of Kentucky, at Covington.

Geo. Bleistein, John W. Bridgman, John A. Rudolph, Ansley Wilcox, Gerrit B. Lansing and Edwin Fleming, doing business under the name of the Courier Lithographing Company, Plaintiffs,

vs.

The Donaldson Lithographing Company, Defendant.

} Bond.

We undertake that the plaintiffs, George Bleistein, John W. Bridgman, John A. Rudolf, Ansley Wilcox, Gerrit Lansing and Edwin Fleming, doing business, etc., shall pay to the defendant, The Donaldson Lithographing Co., the damages, not exceeding double the amount of the plaintiffs' claim in this action, which it may sustain by reason of the order of delivery in this action, if the order therefor is wrongfully obtained.

Given under our hands, this 10th day of June, 1899.
Attest: J. D. Compton.

John A. Rudolf, Sec'y The Courier Co.,
Buffalo, N. Y.
The American Bonding and Trust Co.
of Baltimore City.
James M. Sprague, Attorney in fact.
Ben A. Adams, Attorney in fact.

And on the same day, to wit, June 10th, A. D. 1899, there was issued out of the clerk's office of said court an order for claim and delivery. Said order was and is in words and figures following, to wit:

Circuit Court of the United States for the District of Kentucky.

Geo. Bleistein, John W. Bridgman, John A. Rudolph, Ansley Wilcox, Gerrit B. Lansing and Edwin Fleming, doing business under the name of the Courier Company and the Courier Lithographing Company, Plaintiffs,

vs.

The Donaldson Lithographing Company, Defendant.

Order. Claim & Delivery.

The President of the United States of America, to the Marshal of said District—Greeting:

Whereas, a declaration and petition and affidavit have been filed in the Circuit Court of the United States for the District of Kentucky, this 10th day of June, 1899, in an action by the plaintiffs above named against the defendant above named, arising under section 4965 of the Revised Statutes of the United States, for the seizure and delivery to the plaintiffs of all the plates and copies of all prints alleged to have been made in violation of three different copyrights owned by the plaintiffs, and described in said petition and affidavit as hereinafter set forth, and praying that the process of the said court issue in that behalf, and that the property hereinafter mentioned be adjudged the property of the plaintiffs, according to the statutes in such case made and provided; and a sufficient bond or undertaking having been filed:

Now, therefore, you are hereby commanded to seize, hold and deliver to the plaintiffs, as prescribed by law, all plates or stones, and copies of all prints, cuts or engravings, found in the possession of the defendant, The Donaldson Lithographing Company, and which reproduce and copy the designs, prints, cuts or engravings covered by the copyrights held by the plaintiffs and described as follows, actual value $5.75 per thousand sheets:

1. "Spectacular Ballet Design."
2. "Stirk Family Design."
3. "Statuary Act Design."

And what you shall have done in the premises, do you make return thereof, together with this writ, on the 3rd day of July, 1899, at ten o'clock in the forenoon of that day if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Covington, Kentucky, this tenth day of June, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States of America the one hundred and twenty-third.

Jos. C. Finnell, Clerk.

And afterwards, to wit, on June 13, A. D. 1899, the above order was returned to the clerk's office and filed with the endorsement of the marshal thereon. Said endorsement was and is in words and figures following, to wit:

"United States of America, District of Kentucky, ss.:

I hereby certify that I received the within writ on the 10th day of June, 1899, and that I have executed the same by seizing ten thousand five hundred and ninety (10590) eight page prints and thirteen thousand two hundred and five (13205) copies of four page prints as described in the within writ, and five (5) metal electrotype plates, and have the same now in my possession.

A. D. James, U. S. Marshal,
By J. D. Compton, Deputy."

Fee $1.50
Expense 10

$1.60

And on a day following, to wit, November 27, A. D. 1899, came the defendant, by its attorneys, and entered its appearance and filed its answer herein. Said appearance was and is in words and figures following, to wit:

United States Circuit Court.

George Bleistein et al.,

vs.

The Donaldson Lithographing Co.,

No. 2128.

To the Clerk of said Court:

Please enter our appearance as solicitor and of counsel on behalf of defendant.

E. W. Kittredge, and
Cobb & Howard,
Solicitors for Defendant.

Said answer was and is in words and figures as follows, to wit:

Circuit Court of the United States for the District of Kentucky.

Geo. Bleistein, John W. Bridgman, John A. Rudolf, Ansley Wilcox, Gerrit B. Lansing and Edwin Fleming, doing business under the name of the Courier Lithographing Company, Plaintiffs,

vs.

The Donaldson Lithographing Company, Defendant.

Answer.
No. 2128.

Now comes defendant, and for answer to the declaration, complaint and petition of plaintiff, and to each paragraph and cause of action thereof, says:

It admits that it is a corporation duly organized under the laws of the State of Ohio.

Further answering, it denies each and every other al-

legation therein contained and asks to be hence dismissed with its costs.

E. W. Kittridge,
Cobb & Howard,
Attorneys for Defendant.

State of Ohio, County of Hamilton, ss.:

Wm. H. Donaldson, being duly sworn, says that he is Sec'y & Treasurer of the defendant herein; that he has read the foregoing answer and knows the contents thereof, and that the same is true to his knowledge, except as to the matters therein stated upon information and belief, and that as to these matters he believes it to be true.

Wm. H. Donaldson.

Signed in my presence and sworn to before me, this 27th day of November, A. D. 1899.

Oliver G. Bailey,
Notary Public in and for Hamilton County, Ohio.

And afterwards, to wit, on December 12, A. D. 1899, an entry was made on the Journal of said court, clothed in words and figures following, to wit:

Journal H, Page 556.

By consent of counsel for plaintiff and defendant, the court being advised, it is now ordered that D. A. Brown be and he is appointed official stenographer to report this case, and it is agreed that his fees shall be taxed as a part of the costs in this case.

And on the same day, to wit, December 13, A. D. 1899, an entry was made in the Journal of said court, clothed in words and figures following, to wit:

Journal H, Page 556.

This cause coming on for trial, came the parties, plaintiff and defendant, by their respective attorneys, and having announced ready for trial, came the following jury, to wit: G. T. Raynold, C. S. Griffith, H. H. Reed, Thos. J. Judy, Mat. Conley, Marshall Sleet, D. W. Meyers, John McConnell, C. L. McDaniels, Aaron Owens,

David Martin and R. S. Cowan, who were elected, tried and sworn well and truly to try the issue joined. The jury heard the evidence of plaintiff. Whereupon came the defendant, by its attorneys, and moved the court to instruct the jury to find for defendant. The court not being fully advised, and the usual hour for adjournment having arrived, takes time, and the further consideration of this case is continued until to-morrow morning at 9 a. m.

And on a day following, to wit, December 13, A. D. 1899, an entry was made in the Journal of said court, clothed in words and figures following, to wit:

Journal H, Page 557.

This day came again the parties hereto, by their respective attorneys; came again the jury impaneled and sworn herein. The court now being advised, sustains said motion of defendant to instruct the jury to find for defendant. To which ruling of the court plaintiffs, by their attorney, come and except. Thereupon the court charged the jury and instructed them to return a verdict for defendant. Whereupon, in accordance with said instructions of the court, the jury returned the following verdict to wit:

We, the jury, find for the defendant.

T. J. Judy, Foreman.

Upon which verdict it is ordered by the court that the defendant have and recover of the plaintiffs its costs herein had and expended to be taxed by the clerk.

And on the same day, to wit, December 13, A. D. 1899, an entry was made in the Journal of said court, clothed in words and figures following, to wit:

Journal 8, Page 557.

On motion of plaintiffs, by their attorneys, they are given sixty days in which to prepare and tender bill of evidence.

And on the same day the court filed its written opinion.

(Opinion will be found in full in bill of Exceptions.)

And on the same day, to wit, December 13, A. D. 1899. plaintiffs, by their attorneys, filed motion and grounds for a new trial herein. Said motion and grounds for new trial were and are in words and figures following, to wit:

United States Circuit Court.

George Bleistein et al.,
Plaintiffs,
vs.
The Donaldson Lithographing Co.,
Defendant.

Now comes the plaintiffs and moves the court for a new trial herein, and for ground therefore assigns that the court erred:

1. In sustaining objections to testimony offered by the plaintiff and excluding same.

2. In sustaining the motion of the defendant to charge the jury to find for the defendant, and in so charging.

Wilcox & Miner, and
C. J. & W. W. Helm,
Attorneys for Plaintiffs.

And on a day following, to wit, December 18th, A. D. 1899, an entry was made in the Journal of said court, clothed in words and figures as follows, to wit:

Journal H, Page 558.

This cause coming on to be heard on the motion of the plaintiffs for a new trial herein, the court being fully advised, is of the opinion that same should not be granted and it is ordered that said motion be and same is overruled.

And on a day following, to wit, January 20, A. D. 1900, a petition for writ of error was filed in the clerk's office of said court. Said petition was and is in words and figures following, to wit:

Circuit Court of the United States for the District of Kentucky.

Geo. Bleistein, John W. Bridgman, John A. Rudolf, Ansley Wilcox, Gerrit B. Lansing and Edwin Fleming, doing business under the name of the Courier Company and the Courier Lithographing Company, Plaintiffs,	At Law.
vs.	
The Donaldson Lithographing Company, Defendant.	

Petition for Writ of Error.

Now comes George Bleistein, John W. Bridgman, John A. Rudolf, Ansley Wilcox, Gerrit B. Lansing and Edwin Fleming, plaintiffs herein, and say that on the 13th day of December, 1899, this court entered judgment herein in favor of the defendant, and against these plaintiffs, in which judgment and the pleadings had prior thereto in this cause, certain errors were committed, to the prejudice of these plaintiffs, all of which will in detail appear from the assignment of errors, which is filed with the petition.

Wherefore these plaintiffs pray that a writ of error may issue in their behalf to the United States Circuit Court of Appeals for the Sixth Circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

Wilcox & Miner,
Geo. T. Hogg,
C. J. & W. W. Helm,
Stallo, Richards and Shaw,
Attorneys for Plaintiffs.

And on the same day, to wit, on January 20, A. D. 1900, the following Assignment of Errors was filed in the Clerk's office of said court, clothed in the words and figures following, to wit:

Circuit Court of the United States, for the District of Kentucky.

George Bleistein, John W. Bridgman, John A. Rudolf, Ansley Wilcox, Gerrit B. Lansing and Edwin Fleming, doing business under the name of the Courier Company and the Courier Lithographing Company, Plaintiffs, vs. The Donaldson Lithographing Company, Defendants.	At Law. Assignment of Errors.

The plaintiff in this action, in connection with his petition for a writ of error, makes the following assignment of errors, which he avers occurred upon trial of the same, to wit:

1. The court erred in the rejection of evidence offered by the plaintiff upon said trial in the following instances, to wit:

(1). In rejecting as testimony the following parts of page 129 of Vol. 15, No. 2, whole No. 354, April 20, 1898, of "Catalogue of Title entries of books and other articles entered in the office of the Register of Copyrights Library of Congress, at Washington, D. C., under the copyright law, wherein the copyright has been completed by the deposit of two copies."

"Spectacular Ballet Design (1898, No. 22,966, Apr. 11, 2 copies received Apr. 11, 1898.) 11

Copyright by Courier Lithographing Company, Buffalo, N. Y."

"Statuary Act Design (1898, No. 24,345, Apr. 18, 2 copies received Apr. 11, 1898.) 15

Copyright by Courier Lithographing Company, Buffalo, N. Y."

"Stirk Family, Design (1898, No. 22,959, Apr. 11, 2 copies received Apr. 11, 1898.) 18

Copyright by Courier Lithographing Company, Buffalo, N. Y."

(2). In refusing to allow the witness George Bleistein to answer and tell the jury what was the custom of the trade in regard to the ownership or control of "special matter," which it was avowed he would do as follows: "The custom of the trade when special matter is ordered is that it shall not be used during the continuance of the contract for other parties than those ordering it; but that

thereafter it may be used at the pleasure of the company printing it."

(3). In refusing to allow a negative and photograph printed from it, of the spectacular ballet design reducing the size of the picture from that of the lithographs of plaintiffs to the prints made by defendant, which were seized.

(4). In refusing to allow the plaintiffs to show by the witness, Bleistein, that the employe, Bandlow, who made the designs of the lithographs, Exhibits "A," "B" & "C," had been engaged in making similar lithographic designs which were copyrighted by the plaintiffs, under the name of the Courier Lithographing Company, as proprietors, during the four years which it had been shown that he had been employed by the plaintiffs.

II. The court erred in sustaining defendant's motion to charge the jury to find for the defendant, and in so charging the jury.

III. The court erred in overruling the motion of plaintiff for a new trial.

The court erred in entering judgment in favor of the defendant and against the plaintiff.

Wilcox & Miner,
Geo. T. Hogg,
C. J. & W. W. Helm,
Stallo Richards, and Shaw,
Attorneys for Plaintiffs.

And on the same day, to wit, on January 20, A. D. 1900, an entry was made upon the Journal of said court, clothed in words and figures following, to wit:

Journal H, Page 572.

The plaintiffs, George Bleistein, John W. Bridgman, John A. Rudolf, Ansley Wilcox, Gerrit B. Lansing, and Edwin Fleming, considering themselves aggrieved by the judgment herein entered on the 13th day of December, 1899, come now and present to the court their petition for a Writ of Error to the United States Circuit Court of Appeals, for the Sixth Circuit, together with an Assignment of Errors, asserted and intended to be urged in that behalf.

On consideration whereof, the court orders that on a bond as provided by law, being filed in the sum of five hundred dollars, to the acceptance of the court, the said writ of error be allowed, and it is ordered that a transcript

of the record, proceedings and papers, upon which the judgment of this court was rendered in this cause, duly authenticated, be sent to the United States Circuit Court of Appeals, according to law in such case provided.

And on a day following, to wit, on January 23, A. D. 1900, a bond was filed in the Clerk's office of said court, which was and is in words and figures following, to wit:

Know all Men by These Presents, That we, George Bleistein, John W. Bridgman, et al., as The Courier Co., as principals, and The American Bonding and Trust Company, of Baltimore, Md., as sureties, are held and firmly bound unto the Donaldson Lithographing Company in the full and just sum of five hundred ($500.00) dollars, to be paid to the said The Donaldson Lithographing Company, certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 23rd day of January, in the year of our Lord one thousand nine hundred.

Whereas, lately at a term of the Circuit Court of the United States for the District of Kentucky, at Covington, in a suit depending in said court, between George Bleistein, John W. Bridgman, John A. Ridolf, Ansley Wilcox, Gerrit B. Lansing, and Edwin Fleming, doing business as the Courier Co. and the Courier Lithographing Co., plaintiffs, and The Donaldson Lithographing Company, defendant, a judgment was rendered against the said George Bleistein, John W. Bridgman, John A. Rudolf, Ansley Wilcox, Gerrit B. Lansing, and Edwin Fleming, doing business as the Courier Co. and The Courier Lithographing Co., and the said George Bleistein, et al., doing business as the Courier Co., and The Courier Lithographing Co., having obtained a writ of error and filed a copy thereof in the Clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Donaldson Lithographing Co., citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the city of Cincinnati, in said circuit, on the seventeenth day of February next.

Now, the condition of the above is such, that if the said George Bleistein, et al., doing business as The Courier Co. and the Courier Lithographing Co., shall prosecute their Writ of Error to effect, and answer all damages

and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of

Jos. C. Finnell.

The Courier Co. and the Courier Lithographing Co.,
By C. J. & W. W. Helm, Attys.
The American Bonding and Trust Company, of Baltimore City,
By W. W. Helm, Vic. President,
By Webster Helm, Assist. Sec'y.

Approved by
Walter Evans,
District Judge.

And on January 20, A. D. 1900, a Bill of Exceptions, which had been signed, sealed and approved by the court, was filed herein. Said Bill of Exceptions was and is in words and figures following, to wit:

United States Circuit Court, for the District of Kentucky, sitting at Covington.

George Bleistein, John W. Bridgman, John A. Rudolf, Ansley Wilcox, Gerrit B. Lansing and Edwin Fleming, doing business under the name of the Courier Company and the Courier Lithographing Company, Plaintiffs,

vs.

The Donaldson Lithographing Company, Defendants.

At Law. No. 2128.

Before Hon. Walter Evans and a jury.

Bill of Exceptions.

Appearances.

For plaintiffs: Wilcox & Miner, by George T. Hogg, of counsel; C. J. & W. W. Helm; Stallo, Richard & Shaw.

For defendant: Kittredge & Wilby, by E. W. Kittredge; Cobb & Howard, by Orris P. Cobb.

Covington, December 12, 1899.

Be it remembered, that heretofore, to wit, at the December term, A. D. 1899, of the Circuit Court of the United States for the District of Kentucky, upon the day and date above written, came the parties, the plaintiffs in person and by their attorneys, and the defendant in person and by its attorneys, and this cause came on for trial on the issues joined by and between the parties, before the Hon. Walter Evans, District Judge, and a jury duly impaneled and sworn.

Thereupon the plaintiffs, to maintain the issues on their part, introduced the following evidence and testimony, to wit:

George Bleistein, one of the plaintiffs, was called in behalf of the plaintiffs, and being first duly sworn, testified as follows, to wit:

Direct examination.

By Mr. Hogg:

Q. State your name and place of residence to the jury.
A. George Bleistein, Buffalo, N. Y.
Q. What is your business?
A. A printer and lithographer.
Q. Are you president of the Courier Company?
A. Yes.
Q. And also a member of it?
A. Yes.
Q. Will you give the names of the other members that compose the Courier Company?
A. John W. Bridgman, John A. Rudolf, Ansley Wilcox, Gerrit B. Lansing, Edwin Fleming and myself.
Q. Is the Courier Company an unincorporated association?
A. It is.
Q. Consisting of these men you have named.
A. Yes, sir.
Q. Mr. Bleistein, I show you a copy of a lithograph which is marked "Exhibit A" by Henry B. Loveland, Notary Public. Do you recognize that lithograph?
A. I do.
Q. What is the name of it; what do you call it?
A. We call that the "Statuary Act."
Q. Where was the original of that design engraved?
A. In the Courier Company's office, Courier Lithographing Company.
Q. In Buffalo?

A. Yes.

Mr. Hogg: I ask to have that marked and offered in evidence.

Mr. Kittredge: We object to its admission.

(Said lithograph now offered in evidence and marked "Plffs. Exhibit A, 12|12|99, D. A. B.," received over the objection and exception of counsel for defendant, and is hereto attached and made a part hereof.)

Q. I show you a copy of a lithograph marked "Exhibit C" by Henry B. Loveland, Notary Public. Do you recognize that lithograph?

A. I do.

Q. What is the name of it?

A. It is known as "The Stirk Family" lithograph.

Q. Where was it designed and engraved?

A. In the office of the Courier Company, Courier Lithographing Company.

Q. At Buffalo?

A. Yes, Buffalo, New York.

Mr. Hogg: I ask to have that marked and offered in evidence.

Mr. Kittredge: We object.

(Said lithograph now offered in evidence and marked "Plffs. Exhibit B, 12|12|99, D. A. B.," received over the objection and exception of counsel for defendant, and is hereto attached and made part hereof.)

Q. I show you a lithograph marked Exhibit "B" by Henry B. Loveland, Notary Public. Do you recognize that lithograph?

A. I do.

Q. What do you call it?

A. "Spectacular Ballet."

Q. Where was that lithograph designed and engraved?

A. Office of the Courier Company, Courier Lithographing Company, Buffalo, New York.

Mr. Hogg: I desire to offer that in evidence and have it marked.

Mr. Kittredge: We object.

(Said lithograph now offered in evidence and marked "Plffs. Exhibit C, 12|12|99, D. A. B.," received over the objection and exception of counsel for defendant, and is hereto attached and made a part hereof.)

Q. You have used the words "Courier Company" and "Courier Lithographing Company." Does the Courier Company do a portion of its business under the name of "Courier Lithographing Company"?

A. It does.

Q. Mr. Bleistein, did the Courier Company engrave any other lithographs than those which have been shown to you under the titles that we have named?

A. How do you mean, under the titles that you have named?

Q. Did they make two "Spectacular Ballet" bills, or just one?

A. Just one.

Mr. Hogg: If the court please, I offer in evidence a certified copy of the Librarian of Congress, showing the deposit of the title "Spectacular Ballet" and the description, also a certificate under seal showing the filing of two copies of the lithographs; also the same kind of certificates with reference to the "Stirk Family" design and the "Statuary" design. They are all fastened together, and I would ask that they be considered as read.

The Court: Let them be received.

(Same now offered in evidence and marked "Plffs. Exhibit E, 12|12|99, D. A. B.," being all these certificates as follows, to wit:

1898. No. 22,966.

Library of Congress, to wit:

Be it Remembered:

That on the eleventh day of April, 1898, the Courier Lithographing Company, of Buffalo, New York, hath deposited in this office the title of a lithograph, the title or description of which is in the following words, to wit: Spectacular Ballet Design. Description on file.

The right whereof it claims as proprietor in conformity with the laws of the United States respecting copyrights.

Office of the Register of Copyrights, Washington, D. C.

John Russell Young,
Library of Congress.
By Thorvald Solberg,
Register of Copyright.

1898. No. 22966.

Library of Congress,

Copyright Department.

Washington, D. C.

I hereby certify that two copies of the lithograph entitled Spectacular Ballet Design were deposited in this

office by the Courier Litho. Co. of Buffalo, N. Y., on the eleventh day of April, 1898, and were credited on entry 22966 of 1898 to complete copyright.

In witness whereof, the seal of the Librarian of Congress has been hereto affixed, this 16th day of November, 1899.

Herbert Putnam,
Librarian of Congress,
By Thorvald Solberg,
Register of Copyright.

(10 cent revenue stamp.)

1898. No. 22959.

Library of Congress, To Wit:

Be it Remembered:

That on the eleventh day of April, 1898, the Courier Litho. Co. of Buffalo, N. Y., hath deposited in this office the title of the lithograph the title or description of which is in the following words, to wit:

Stirk Family Design.

Description on file.

The right whereof it claims as proprietor in conformity with the laws of the United States respecting copyrights.

Office of Register of Copyrights,
Washington, D. C.

John Russell Young,
Librarian of Congress,
By Thorvald Solberg,
Register of Copyrights.

1898. No. 22959.

Library of Congress,

Copyright Department.

Washington, D. C.

I hereby certify that two copies of the lithograph entitled Stirk Family Design were deposited in this office by the Courier Litho Co. of Buffalo, N. Y., on the eleventh day of April, 1898, and were credited on Entry No. 22959 of 1898, to complete copyright.

In witness whereof, the seal of the Librarian of Con-

gress has been hereto affixed, this 16th day of November, 1899.

Herbert Putnam,
Librarian of Congress,
By Thorvald Solberg,
Register of Copyright.

(10 cent revenue stamp.)

1898. No. 24345.

Library of Congress, To Wit:

Be it Remembered:

That on the eighteenth day of April, 1898, the Courier Co. of Buffalo, N. Y., hath deposited in this office the title of a lithograph the title or description of which is in the following words, to wit:

Statuary Act Design.

Description on file.

The right whereof it claims as proprietor in conformity with the laws of the United States respecting copyrights.

Office of Register of Copyrights,
Washington, D. C.

John Russell Young,
Librarian of Congress,
By Thorvald Solberg,
Register of Copyrights.

1898. No. 24345.

Library of Congress,

Copyright Department.

Washington, D. C.

I hereby certify that two copies of the lithograph entitled Statuary Act Design were deposited in this office by the Courier Company of Buffalo, N. Y., on the eleventh day of April, 1898, and were credited on Entry No. 24345 of 1898, to complete copyright.

In witness whereof, the seal of the Librarian of Congress has been hereto affixed, this 16th day of November, 1899.

Herbert Putnam,
Librarian of Congress,
By Thorvald Solberg,
Register of Copyright.

(10 cent revenue stamp.)

The Court: The real controversy will be whether this is a subject of copyright, whether it comes within the copyright law—it might be whether the proper person has applied for obtaining the copyright.

Mr. Hogg: I will also offer in evidence, if the court please, page 129 of the Official Catalogue of Title Entries of books and other articles entered in the office of the Register of Copyrights, Library of Congress, Washington, D. C., under the copyright law, wherein the copyright has been completed by the deposit of two copies, and especially the particular entries thereon, which I will ask the stenographer to mark at page 129 (indicating same).

(Said entries appear at page 129 of a pamphlet or book entitled on the title page thereof, "Library of Congress, Office of the Register of Copyrights, Washington, D. C.)

Catalogue of Title entries of books and other articles entered in the office of the Register of Copyrights, Library of Congress at Washington, D. C., under the copyright law, wherein the copyright has been completed by the deposit of two copies.

Vol. 15, No. 2, Whole No. 354, April 20, 1898." The entries marked by the stenographer with initials "D. A. B." on said page 129 of said pamphlet or book being as follows, to wit:

"Spectacular Ballet Design. (1898, No. 22966, Apr. 11, 2 copies rec'd Apr. 11, 1898.) 11

Copyright by Courier Litho. Co., Buffalo, N. Y."

Also "Statutory Act. Design. (1898, No. 24345, Apr. 18, 2 copies rec'd Apr. 11, 1898.) 15

Copyright by Courier Litho. Co., Buffalo, N. Y."

Also "Stirk Family. Design. (1898, No. 22959, Apr. 11, 2 copies rec'd Apr. 11, 1898.) 18

Copyright by Courier Litho. Co., Buffalo, N. Y."

Mr. Kittredge: We object to the introduction of the above on the ground that the pamphlet or book is not any document which is admissible in evidence at all.

The Court: Does the statute provide what publication shall be made?

Judge Helm: That is the original publication provided to be made by the Secretary of the Treasury every two weeks.

The Court: That adds nothing, as I understand, to the certificate.

Mr. Hogg: It is cumulative.

Mr. Kittredge: We don't think it cumulative. It is irrelevant therefore.

Mr. Hogg: It is Section 4958 of the law, if your honor cares to read it.

The Court: I think those need not be read. I do not think that is meant to be evidence, only certain information. I think all that is necessary is the deposit of the copies if subject to copyright.

Mr. Hogg: Do I understand your honor to exclude it?

The Court: I overrule the motion to introduce that part of the book as evidence.

Mr. Hogg: To which we except and ask that it be made a part of the record.

Cross Examination.

By Mr. Kittredge:

Q. I understood you to say you were president; what are you president of?

A. I am president of the Courier Company and the Courier Litho. Co.

Q. Are those two companies?

A. It is known as two companies, but it is practically one company. A portion of the business is done under the name of the Courier Lithographing Company.

Q. And neither of them incorporated?

A. Yes, sir.

Q. Do you say yes they are?

A. Is it either you said? I thought you said neither.

Q. Which one is incorporated?

A. The Courier Company.

Q. The Courier Company is incorporated?

A. Yes, sir.

Q. How is it with the Courier Lithographing Co., does that do business with the Courier Company?

A. It is a part of the Courier Company.

Q. The Courier Company is a corporation under the laws of New York?

A. That is an unincorporated joint stock association.

Q. By a "joint stock association" you mean that it is a joint stock association under the laws of New York?

A. Yes, unincorporated, an unincorporated joint stock association. We have to file certificates.

Q. Do I understand you to say that the Courier Company is incorporated as a joint stock company under the laws of New York, and has filed a certificate?

A. It is an unincorporated joint stock association under the laws of New York.

Q. And you are the president of that joint stock company?

A. Yes, sir.

Q. And the Courier Lithographing Company is a part of the Courier Company?

A. Yes, sir.

Q. Another name in which the Courier Company does business?

A. Yes, sir.

Q. Mr. Bleistein, those three pictures that have been introduced, who were they made for? (Referring to Exhibits A, B and C heretofore offered by plaintiff.)

A. They were sold to Mr. Wallace.

Q. They were made, were they not, under contract with Mr. Wallace for them?

A. Yes, practically so.

Q. Mr. Wallace is the gentleman whose picture is in the corner here (indicating on one of said exhibits)?

A. Yes, sir.

Q. They were made under a contract with them and for them. Did you make the contract?

A. I don't remember that I made that specific one, the year that these were printed in.

Q. Who did represent the joint stock company in making that contract?

A. Either Mr. John A. Rudolf or myself.

Q. Can't you tell whether it was yourself?

A. I am not positive. Some years Mr. Rudolf did. I rather think Mr. Rudolf did.

Q. The Wallace Company is a circus company, is it not?

A. Mr. B. E. Wallace, yes, owns the Wallace Show.

Q. Known as the "Wallace Show," and this was made under contract with them as an advertisement of their show, wasn't it?

A. Yes.

Q. Never has been made for anybody else, has it?

A. Not up to the present time that I know of.

Q. That's what I am asking about. And the contract was there. Mr. Wallace was in Buffalo—or where was this contract made with Mr. Wallace?

A. I think it was made in Peru, Indiana, where he lives.

Q. Where Mr. Wallace lives? That is true in reference to each of those papers?

A. Yes.

Q. What you have said about the one I have been showing to you—which was the Ballet picture—is true as to each of them? (Referring to said Exhibits A, B and C above.)

A. Yes, sir.

Q. That is to say, they were made for Mr. Wallace under contract with him as an advertisement for his show, and they have never been made for anybody else?

A. Not up to the present time.

Q. That's all I ask about.

A. Only as the Donaldson Lithographing Company used them.

Mr. Kittredge: That was not covered by my question and I ask to have it ruled out.

The Court: Go ahead.

Q. Mr. Bleistein, how long have you been in this business?

A. I have been with the Courier Company ever since I have been in business.

Q. How many years is that?

A. Twenty-three or twenty-four years.

Q. Do you know what are called stock papers of advertisements that are made for circus companies?

A. I have known such things, yes.

Q. Do you know what is meant by "stock papers"?

A. Yes.

Q. What is meant by "stock papers"?

A. Stock paper is paper printed and up on the shelves that you will sell to any one.

Q. And what are "special papers"?

A. Special papers are gotten up for the use of people for a certain length of time, as long as they choose to use them.

Q. For special people?

A. Yes, sir, and in special quantities.

Q. Under a contract with them?

A. Sometimes.

Q. And as long as they are got up for them, they are not entitled to be used by anybody else, are they, by the understanding of the trade?

A. The understanding of the trade is, that you would not sell them to any one whether they are copyrighted or not.

Q. That is "special papers"?

A. That is special papers.

Q. You would not sell them to any one except parties for whom they were got up?

A. Not if we had an agreement to that effect.

Q. But if they were got up as special papers, that is the understanding of the agreement?

A. As a general rule.

Q. And that is generally known in the trade, is it not?

A. Yes, sir.

Q. Now these are special papers, all three of them? (Still referring to Exhibits A, B and C above.)

A. Yes, sir.

Q. Got up under contract with Wallace under the understanding that you have stated?

A. Yes.

Re-direct Examination.

By Mr. Hogg:

Mr. Hogg: Counsel has used the words "incorporated" and "unincorporated"—

The Court: You don't need to go into that.

Mr. Hogg: I wanted to ask the witness what he intended to say, that's all.

Q. You intended to say unincorporated or incorporated, which?

A. I think the last time I did say—I did say all through unincorporated joint stock association.

Q. (By Mr. Kittredge:) I forgot to ask one question: I want to know the date when the certificate of the joint stock company was filed. I forgot to ask you the date of it. How long ago was it?

A. We are obliged under the law to file every year with the Comptroller of the State of New York, and also with the county clerk of Erie County, where Buffalo is located, a certificate showing the officers of the company and the stockholders.

Q. Yes. I ask you what date you commenced, when you first did that?

A. Oh, the Courier Company was — the Articles of By-laws were first started some twenty-four or twenty-five or twenty-six years ago, at any rate.

Q. At any rate long prior to this agreement with Wallace?

A. Oh, yes.

Q. (By Mr. Hogg:) This special work that the counsel has asked you about and your agreement not to sell to anybody else, I would ask you to state to the court whether or not you do sell it to anybody else after the party is through with it.

Mr. Kittredge: I object.

The Court: You went into this. Let's see about it. What is your answer to that, Mr. Witness?

The Witness: Yes, sir.

(To which the defendant, by counsel, then and there excepted.)

Q. What is the custom of the trade in that regard?

The Court: No, I can not see the materiality of that.

(To the excluding of which question by the court the plaintiffs, by counsel, objected and excepted, and avowed as follows:)

(Avowal.)

The plaintiff avows that he can prove by the witness upon the stand that the custom of the trade when special matter is ordered is, that it shall not be used during the continuance of the contract for other parties than those ordering it; but that thereafter it may be used at the pleasure of the company printing it and copyrighting it—

The Court: Copyrighting it is the thing. The custom of the trade has nothing to do with it. You can not prove that by him. You can not prove your whole case in an avowal. I will allow the avowal as to the one question.

Judge Helm: I want to show what we think we can prove the custom of the trade is.

The Court: That won't let copyrighting in.

Judge Helm: Leave copyrighting out, as your honor suggests.

The Court: The court sustains the objection.

(To which ruling of the court counsel for plaintiffs then and there excepted.)

By the Court:

Q. I want to ask which one of these lithographs here is what you call the "Statuary Act"?

(Witness indicates for answer Exhibit A., heretofore offered in evidence.)

Q. I see on that the words "Landing of Columbus." What does that mean?

A. It means that that statue is an act supposed to represent the Landing of Columbus.

Q. And all this other—

A. Represents things according to the description.

Q. Who designed that?

A. Designed by the Courier Company, at Buffalo, by our man.

Q. Which one of your men?

A. I think that was designed by a man named August Bandlow.

Q. When?

A. I can't give the exact date. Just some short time before we received the copyrights, just immediately the first proof was sent to Washington.

Q. When was this first published?

A. It was first published when it was sent, the first copy of it was sent to Washington, just two copies sent to Washington for copyright, and none were issued till shipped to Mr. Wallace.

Q. How does the Buffalo Company, or the Buffalo Lithographing Company become proprietor of this engraving or picture?

A. Because in our contract with Mr. Wallace, and with all the shows, we simply agree to furnish a stated amount of paper, whether it is old or new, for a certain amount of money per sheet. We reserve rights of design that we put in our copyright. We copyright that with the simple view that as long as Mr. Wallace uses that, he has the right to use it; but if he ceases to use that bill—say he does not do the Statuary Act next year—we have the right with that design to sell to other people who may want to use that sort of thing.

Mr. Kittredge: I want to move to rule this answer out.

The Court: I want first to see whether that company is the proprietor of this.

Q. (By the Court.) I ask you how the plaintiffs in this case, or either of them, became the proprietor of that design?

The Witness: Because—

The Court: Just say how, don't say because.

The Witness: I thought I explained it. We reserve the right to copyright, and that has been the custom for years.

Q. How do you become proprietor of that design?

A. By having it made by one of our men, his original, own idea.

Q. What was that—one of the plaintiffs in this case?

A. No.

Q. He is not one of the plaintiffs and has no interest in your company?

A. None whatever. He is an employe.

Q. And he designed that?

A. He did.

Q. By what mode did he transfer his right and proprietorship in that design to you?

A. His mode and right of proprietorship he never had, because we engage his talent and his services and pay for them. What he does produce belongs to us, because we pay for it to him.

Q. That is, the only right you have got to it is that he is your employe—is an employe of yours, and he designed this?

A. We engage his talents. We pay for his talents.

Q. You have no other sort of title to this, it is not manifested in any other way?

A. Not that I know of. We simply pay for his talent.

Q. Now referring to this next one, "The Stirk Family"; who designed that?

A. I think Mr. Bandlow did. I am quite sure he did that too. We have two or three men doing that class of work. I am nearly sure he did it.

Q. He was the author and designer of that?

A. I presume he was.

Q. You don't know?

A. I won't swear positively. We had two men. The one with the ballet I am absolutely positive about.

Q. Not the Ballet, but the other one, this Statuary scene?

A. I am quite sure Mr. Bandlow did—I think Mr. Rudolf, who is more in charge of the details of the work, can explain that.

Q. But you understand that one of your men designed it and he has never made to you any transfer of that design further than you assume ownership of it because he was in your employ; is that the fact?

A. Yes, we engage his talents, and what he produces belongs to us.

Q. Have you your contract with him?

A. We have no contract.

Q. Who designed those three?

A. Mr. Bandlow.

Q. You don't think you have any right to it except as it is derived from his being in your employ? What sort of work is that?

A. Lithograph work, done by stone.

Q. All three of them lithograph work?

A. Yes, sir.

Mr. Hogg: I would like to ask one or two questions suggested by your honor's questions.

Q. When you said you had no contract with Mr. Bandlow, you meant you had no written contract?

(Objected and excepted to by counsel for defendant.)

A. No written contract. He is engaged at so much per week salary.

Q. How long has he been in your employ?

A. Mr. Bandlow has been with us I think about four years.

Q. State whether or not Mr. Bandlow has been engaged during the four years he has been in your employ in this kind of work?

(Objected to by counsel for defendant. Objection sustained, to which counsel for plaintiff excepted.)

The Court: These three are all you can inquire about.

Q. State what your agreement with Mr. Bandlow was.

Mr. Kittredge: He says simply so much per week.

The Court: Let him state what the agreement was.

The Witness: My agreement with Mr. Bandlow is, that he was to receive while in our employ $100.00 a week as designer. He was to furnish us with such designs as we needed, and they were to be our property, for consideration of that he was to receive $100.00 per week.

Mr. Kittredge: I move to exclude that answer.

(Motion overruled, to which defendant by counsel then and there excepted.)

Re-cross examination:

By Mr. Kittredge:

Q. Were you present and did you see Mr. Bandlow working on either of these designs (referring to Exhibits A, B and C)?

A. Yes.

Q. Which one did you see him at work on?

A. I think—I know I saw him at work on the Ballet Bill.

Q. You know you saw him at work on that?

A. Yes, sir.

Q. Did you see him at work on either of the others?

A. I am quite sure I did on the Statue Act, but would not swear positively.

Q. You won't swear positively, but think you saw him working on the Statue Act?

A. I don't think—I know.

Q. Well, you do swear positively—

A. You asked me the question while you had that in your hand.

Q. You won't swear to the Statuary?

A. You had that in your hand.

Q. Was it from a photograph that that picture of Mr. Wallace was made?

Judge Helm: We object. There is no claim in connection with this as to the picture of Mr. Wallace. The whole claim is as to the figures there constituting the Ballet Dance.

Mr. Kittredge: That may be true. There is nothing in the certificate of copyright.

The Court: Did you furnish a copy of that whole thing when you copyrighted it?

The witness: Yes.

The Court: Then you can answer.

(To which counsel for plaintiffs then and there excepted.)

Q. Who furnished that head?

A. I dare say Mr. Wallace or one of his agents, I presume.

Q. Who furnished you all this descriptive matter here—who furnished you that red, and this name of the show, etc.

A. You mean the reading matter?

Q. The reading matter, all of it, the heading and footing of it?

Judge Helm: I want to save an exception to that.

The Court: That is part of it. You have introduced that as the real thing.

Mr. Kittredge: That was sent to Washington.

The Court: If you say now that this was the thing you published—

Q. (By Mr. Kittredge). The descriptive matter has not been read to your honor. Who furnished that head and all that reading matter?

A. Mr. Wallace's representatives.

Q. That is true of each of those pictures?

A. Yes.

Q. Were you present when you made—is that the one you think you were present, the Statuary, when it was made?

A. No, I saw him working at it.

Q. You said in answer to his honor, the judge, that that is representative of the "Landing of Columbus." Don't you know that each one of those was intended to represent a part of the performance of the Wallace Circus Company; don't you know each one of those pictures was what the Wallace Circus Company professed to exhibit to the public?

A. I presume that is so.

Q. Don't you know it is so?

A. Well, I don't—

Q. Don't you know that that was intended to represent as a part of their advertisement of what they were going to show to the public at their circus, what they were going to present—each one of these pictures?

A. That is what they expected to do, I presume, when we got it out.

Q. That was true in reference to the bicycle picture, wasn't it?

A. Yes, sir.

Q. That was true in reference to the Ballet?

A. Yes, sir.

Q. Who informed you, or furnished information to you concerning that, that was what they intended to ex-

hibit to the public, that they intended to present a ballet of that kind?

A. Mr. Wallace simply wanted us to get up a—

Q. Now, answer my question. Who informed you?

A. I am trying to do that.

Q. Answer my question. It is a simple question; who informed you that that was—that they intended to present a ballet of that character?

A. Mr. Wallace or his agent informed us that they were going to present a ballet. Whether it was just of that character or not, I don't know.

Q. Who informed you that they were going to present the scene of the bicycle performance?

A. Mr. Wallace or his agent, I dare say.

Q. Who informed you that they intended to present these statuary pictures as a performance in their circus?

A. Mr. Wallace, or his agent, I dare say; not that they were to have these very same things. They were left to us to design.

By Judge Helm:

Q. One question: I want to ask you this, Mr. Bleistein, were these engravings or these drawings made from descriptions given you by Mr. Wallace's show, or any employe of that show, or were they the creation of your employes?

(Objected to by counsel for defendant. Objection overruled, to which defendant by counsel then and there excepted.)

A. They were the creation of our employes, principally.

Q. Take the ballet matter; was that principally, or was it not entirely your creation?

A. Entirely.

Mr. Kittredge: That is objected to as leading. I don't see why they should be allowed to put the answers in the mouth of their own client.

The Court: Let him answer the question. We can't argue all these little points.

(To which counsel for defendant excepted.)

Q. And the same question as to the Statuary design. Was that the entire creation of your artist?

(Objected and excepted to by counsel for defendant as to form.)

A. Now, I am not absolutely positive about that, entirely the creation.

And also John A. Rudolf, one of the plaintiffs, called in behalf of the plaintiffs being first duly sworn, was examined and testified as follows:

Direct examination:

By Mr. Hogg:

Q. Where do you reside?
A. In Buffalo, New York.
Q. What is your business?
A. Secretary of the Courier Company.
Q. You are one of the plaintiffs to this action?
A. I am.
Q. You have charge of the lithographic work of the Courier Company?
A. I have charge of the lithographic work department, as well as all other departments.
Q. I show you a memorandum. Is that in your handwriting (handing witness)?
A. It is.
(Same exhibited to counsel for defendant at his request.)
Q. Having refreshed your recollection from that memorandum, are you able to state when the first of the three lithographs, "The Stirk Family" design, "Spectacular Ballet" design, and "Statuary Act" design, left the office of the Courier Company?
Mr. Kittredge: Wait a minute. I don't know when he made this memorandum. He can't make a memorandum to testify from on the stand.
Q. Was that memorandum made on the day it appears to be on the paper?
A. March 24, 1898.
Q. (By Mr. Kittredge.) Do I understand the witness to testify that this writing was made on March 24th?
A. You do, sir.
(Question above now read to witness, viz.):
Q. Having refreshed your recollection from that memorandum, are you able to state when the first of the three lithographs, "The Stirk Family" design, "Spectacular Ballet" design, and "Statuary Act" design, left the office of the Courier Company?
A. I am.
Q. What was that date?
A. April 11th.
Q. Where were they shipped?
A. Peru, Indiana.
Q. What time were they due there?

A. April 15, according to contract.

The Court: The real inquiry is, whether these copies were sent to the Librarian of Congress before they were published. That is the whole thing.

Mr. Kittredge: It is the dates that we want.

The Court: You can ask him about the dates on the cross-examination.

Q. By Mr. Hogg): Mr. Rudolf, what is the book which you hold in your hand?

A. The letter copying book of the lithograph department of the Courier Company.

Q. Having refreshed your recollection from an examination of that book, are you able to state the day the copyrighted bills which have been referred to here were sent to Washington, together with the applications for copyright?

A. I can.

The Court: Now state the date.

The Witness: The Spectacular Ballet and the Stirk Family were sent, left our office April 9, 1898.

Q. Now, the Statuary Act Design?

A. The Statuary Act Design left our office on the 15th day of April, 1898.

Q. By mail?

A. By mail.

By Mr. Kittredge:

Q. Let me see what you refer to, to refresh your memory, if you will.

A. There is a copy of our letter to the Librarian of Congress, notifying him of the fact and giving a description of the lithographs.

Q. Where is the other one you referred to?

(Witness silently indicates page.)

Q. Page 85, this letter is on; what page is the other on?

A. I have not got to it yet.

Mr. Kittredge: I want to see these exhibits he is refreshing his memory about.

(The witness turns over leaves and points to another place in book.)

Mr. Kittredge: That is page 206?

A. Yes, sir.

By Mr. Hogg:

Q. Were you present when the marshal seized some bills under the order of claim and delivery issued in this case?

A. I was.

Q. Are those specimens of the bills seized (handing to witness)?

A. They are.

Mr. Hogg: I will offer these in evidence.

(Same received and marked "Plffs.' Exhibits G, H, I, J, K. L, 12|12|99, D. A. B.," respectively.)

Q. I show you a photograph (handing witness); did you see it taken?

A. I did. It was made under my instructions.

Q. Was it made from this bill which I hold in my hand?

A. It was.

Q. Is that the same as Exhibit B (referring to Plffs.' Exhibit B, 12|12|99, D. A. B." heretofore offered.)?

A. Yes, sir.

Mr. Hogg: I offer that photograph in evidence.

Mr. Kittredge: We object. What for?

Mr. Hogg: For the purpose of comparing. It is just the same as what we claim you have infringed.

Mr. Kittredge: We object to this. That can't aid the proof of infringement.

Judge Helm: We are offering that for the purpose that the jury may compare that which is reduced to the exact size of this. By laying the negative upon the picture that we seized, it will be seen that line for line they correspond. Therefore, it is very material that the jury may make that comparison. We are proving by this witness that he was present when they were made, this photograph reduced from—

(Said photograph above referred to, marked "Plffs.' Exhibit N, 12|12|99, D. A. B.," and the negative designated as "Plffs' Exhibit O, 12|12|99, D. A. B.," and said marking placed upon reverse of photograph because impossible to mark on the glass. Said two exhibits were tied together.)

The Court: What you want to do is to compare those that were copyrighted. That is the only thing you can do.

(Objection sustained, to which plaintiff by counsel then and there excepted.)

Cross Examination.

By Mr. Kittredge:

Q. If I understand you, you sent these copies to John Russell Young, referred to in your letter, April 9, 1898, by express?

A. Yes, sir.

Q. And you sent the other by mail on April 15, and not in a registered letter?

A. Yes, sir.

Q. Can you turn in your letter book to your letter in which you made your first shipment the 11th of April to Mr. Wallace (handing witness letter copy book marked on back, "Litho. letters from April 5 to May 11, 1898")?

A. I can't turn in that book; it is not in there.

Q. Where is it?

A. Here. (Indicating a different letter book.)

Q. Can you turn to your letter book of that date, to the letter addressed to Mr. Wallace on the 11th of April?

A. Here is a letter from Mr. Franklin dated on the 8th.

Mr. Kittredge: May I see it? Will your honor pardon me while I read it? I have not seen this.

The Court: You have no right to look at the defendant's letter book. You can ask when the first shipment was made to Wallace.

The Witness: On the 11th.

Q. I ask if you wrote a letter accompanying the shipment?

A. I think we wrote a letter. We notified them three days in advance of the shipment, and wrote them the day after the shipment. We have both letters here.

Q. I would like to see the one you wrote the day after the shipment.

A. That was mailed to the agent of the—

The Court: Have you got the letter to Wallace?

Mr. Kittredge: No, sir, we have not. I wish we had.

Judge Helm: You could have had it by taking his deposition, or proving that you couldn't get it.

Mr. Kittredge: I don't know about that. I want the letter you wrote when you made this shipment, or as you say, the day after.

Judge Helm: Read the letter.

Mr. Kittredge: But first I want to read it.

The Court: You have to take the chances. You have no right to look into their letter book. If you had notified them you might introduce secondary evidence; but you can't compel them in this way to show their own letter book in their possession.

Q. What date do I understand you to say this was shipped to the Wallace Company?

A. April 11.

Q. All three of them?

A. Yes, sir.

Examined by the Court:

Q. How long before this date had those copies that were sent been published?

A. Sent to Wallace?

Q. Yes.

A. Well, as far as the definite number of days, your honor, it would be hard for me to tell. Some of them were finished every day—some two or three weeks before.

Q. Some of these copies were finished two or three weeks before?

A. No, the entire edition was finished at one time.

Q. Which ones were printed and published before, or ten or twelve days before this shipment was made to Wallace?

A. That I couldn't say.

Q. You can't tell which one?

A. There is no printer can tell that.

Q. As a matter of fact, I mean?

A. The only thing I can say, they were shipped on the 11th, they were printed previous to that; but how many days sooner than that it is impossible for me to answer that question.

Q. What was the earliest that some of those copies had been printed—how many days before the 11th?

A. That I say—if you could ask that question in a different way—it was our method as soon as bills were completed, to send the first two copies that were completed to Washington.

Q. I know that. They have all said that. But how long were any of those copies that you sent to Washington printed before you sent that letter of the 11th?

A. We sent two of them on the 9th—

Q. To Wallace?

A. To the Librarian.

Q. You don't understand. How long before the 11th of April had you printed any of those copies that you sent to Wallace?

A. I couldn't tell you how many days before.

Q. You don't know?

A. No, sir, I don't; it is impossible in the volume of our business.

Q. You said some of them had been printed ten or twelve days before?

A. They may. Those were not the only ones printed for Mr. Wallace at that time.

Q. It is not worth while to mention any others. I want to get the exact dates when you sent those to the Librarian.

A. April 9th, two of them.
Q. And the other was when?
A. April 15th.
Q. And the shipment to Wallace?
A. Went on the 11th.
Mr. Kittredge: All three of them to arrive there on the 15th, stipulated?
The Witness: Yes, sir, that's right, sir.

By Mr. Kittredge:

Have you got the letter that you said accompanied the shipment with you here?
A. I have not.
Q. The letter of the 12th of April to Wallace?
A. I don't know whether there was a letter written to Mr. Wallace or not. I said that those letters of shipment go to the agent.
Q. What agent?
A. To Mr. Wallace's agent.
Q. Have you the letter that accompanied your shipment, to his agent, or that was written about the shipment to his agent?
A. I have not.
Q. You say that was written on the 12th?
A. They usually follow the day after they are shipped.

Re-direct Examination.

By Judge Helm:

Q. I want to ask this question, suggested by the judge's interrogation: Were any of those bills issued to the world from your office prior to the time you shipped them to Wallace's Show?
A. There wasn't a single copy of either of those bills left our office except the ones that we sent to Washington.
Q. There wasn't a single one?
A. Not one. The first bill of this description, except the ones that went to Washington, were sent to Wallace or his agent, April 11th.
Q. You say you were present when these bills you have filed here were seized in Mr. Donaldson's lithographing establishment?
A. I was.
Q. What, if anything, did Mr. Donaldson say in reference to the time they were seized—the elder Mr. Donaldson?
A. Mr. Donaldson showed me one of his Ballet Designs, and asked me whether I considered it an infringe-

ment of my design. I told him I was not answering those kinds of questions; and he further told me that he knew that we had a copyrighted design of the Ballet bill that we had made for Wallace, and which he gave to his artists so that they would not copy our designs.

Q. (By the Court:) You say these that you seized were exactly like those, the whole of them?

A. No, sir, I don't claim that.

Q. (By Judge Helm:) Did you make the contract with Wallace Bros.?

A. With Wallace I did.

Mr. Kittredge: Which contract?

Judge Helm: I mean the contract for the using of these bills that were to advertise—

The Court: We won't go into that.

Judge Helm: The other side went into it with Mr. Bleistein and proved that special matter was prepared for Wallace Bros. We reserve the right, if necessary, in rebuttal to introduce that.

By Mr. Kittredge:

Q. Did I understand you to say that the seizures were not all like these (indicating the plaintiffs' Exhibits G to L, heretofore offered this date)?

A. I said nothing of the kind.

The Court: What he said was, that he didn't claim that those seized were exactly like these in all respects.

Judge Helm: Your honor is in error. There was a large lithograph like that; and that was not an exact reproduction of this Ballet, but these smaller ones are all exactly reproductions.

The Witness: They are not, because the protraits and that lettering is left off.

Judge Helm: We want to offer the order of claim and delivery and the marshal's return upon it as testimony in the case.

(The same being as follows:)

Wilcox & Miner,
Attorneys for Plaintiffs.
Office and Post Office Address,
Room 816 Ellicott Square,
295 Main Street, Buffalo, New York.

Returned and filed June 13, 1899.
Jos. C. Finnell, Clerk,
By L. M. Van Dyke, D. C.,
Security.

Mr. Kittredge: We object to this.

The Court: Wait till we see what connection it has with the case.

And also J. D. Compton, a witness called in behalf of the plaintiffs, being first duly sworn, was examined and testified as follows, to wit:

Direct Examination.

By Judge Helm:

Q. You are the deputy marshal in this district?

A. Yes, sir.

Q. Did you have this order of claim and delivery for execution (handing to witness original of the foregoing)?

A. I did, yes, sir.

Q. Did you execute it?

A. I did.

Q. What did you do in executing it?

A. I took these copies here, took them and stored them, the copies and plates.

Q. How many copies did you take, and of what?

Mr. Kittredge: I want to know whether the copies he took are of this character (indicating Plffs's Exhibits G to L, inclusive).

The Court: He says that those are introduced in evidence.

The Witness: Ten thousand five hundred and ninety (10,590) eight-page prints, and thirteen thousand two hundred and five (13,205) copies of four-page prints, as described in the writ, and five (5) metal electrotype plates.

Q. Have you those in your possession?

A. Yes, sir, we have them stored.

Judge Helm: We want to offer them in evidence; but don't suppose the court will require us to bring them into court.

Mr. Kittredge: Samples of them will do.

(Same considered as received in evidence.)

Q. I will ask you to look at these and point out which one of them is the eight page print which you say you seized 10,590 copies of. (Calling witness' attention to "Plffs.' Exhibits G to L of this date.")

A. This is it. (Witness indicates Plffs.' Exhibit marked "K, 12|12|99 D. A. B.")

Q. Which is the four-page print of which you say you seized thirteen thousand two hundred and five (13,205) copies?

(For answer the witness indicated "Plffs.' Exhibit marked "G, 12|12|99, D. A. B.")

Q. (By Judge Helm:) And you received five (5) metal electrotype plates. It is considered that this witness identifies them in testimony?

Mr. Kittredge: If he identifies them as the plates from which these two were struck.

Judge Helm: I don't know as he can do that. He don't know anything about the business.

The Witness: I have not got the plates. I can get them.

Judge Helm: It is understood we are offering those plates that he seized.

Mr. Kittredge: Yes, only I want to reserve my right to object when they come.

Q. Where did you seize those?

A. I think it was in June.

Q. No, I said where did you seize them?

A. In Newport, corner Sixth & Washington Avenue.

Q. In whose establishment?

A. Donaldson Lithographing Company.

Q. Who was present when you seized them?

A. Mr. Donaldson, I believe.

Q. Which Mr. Donaldson—the gentleman sitting there?

A. That gentleman, William Donaldson (indicating the elder Mr. Donaldson).

Q. President of the Donaldson Lithographing Company?

A. Yes, sir.

Q. And did he assist in gathering them together for you?

A. He did.

Q. Do you remember what, if anything, he said in connection with these matters at the time that you seized them—I mean in connection with his knowledge of their being copyrighted?

A. No, I can't say that I do. I remember that he said it was unfortunate that I came in so late; that he didn't know much about where they were located, and the men that did know were gone. I believe he said to me though that they were not infringements.

Mr. Kittredge: I don't care to ask him any questions. When the plates come we may want to ask.

And also the depositions of John G. Miller, Burt Hagle and George A. Scheffler, now read in evidence on behalf of the plaintiffs by Mr. George T. Hogg, as follows, to wit:

John G. Miller, being first duly cautioned and sworn, deposes and says on being questioned by counsel for plaintiffs:

My name is John G. Miller. I reside at No. 58 Welker St., Buffalo, N. Y. Am foreman in the pasting and shipping department of the Courier Company, Buffalo, N. Y. I have charge of the shipment of lithographs for circuses, and did have in 1898. I keep a record of the various circus bills that are shipped by the Courier Co., and did in 1898. I remember three certain bills printed by the Courier Co. in 1898, and known as "Spectacular Ballet Design," "Stirk Family Design" and "Statuary Act Design." I am able to state the day the first of each of said bills left the Courier Co.'s plant; where they were shipped to, and the time they were to be ready for delivery at their destination, and who they were shipped to. All three bills were shipped at one time; they were shipped to one consignee; there were three boxes; they were all shipped to W. R. Musgat, agt. for the Wallace Shows at Peru, Ind., on April 11, 1898, and were due at destination on April 15, 1898. In speaking of bill I mean Circus Bills. Witness was here shown copies of three circus bills. Same are marked for identification respectively, Exhibit "A," "B" and "C," Exhibit "A" being "Statuary Act Design," Exhibit "B" being "Spectacular Ballet Design," and Exhibit "C" being "Stirk Family Design." I recognize these three bills, they are copies of the three bills shipped on April 11, 1898, by me to W. R. Musgat, Agt. All three bills so shipped had on them these words, "Copyright 1898, Courier Litho. Co., Buffalo, N. Y." The bills shipped April 11, 1898, were the first bills shipped of these three designs.

On cross-examination by Orris P. Cobb, of counsel for Deft., Mr. Miller, the witness testified as follows:

Q. You are foreman in the posting and shipping department?

A. I am.

Q. You are not the book-keeper?

A. I am not. I am my own book-keeper in my own department.

Q. Aside from any memoranda you may have, have you any independent recollection as to the date of shipping these bills?

A. No.

Q. You fixed the date in your testimony from certain records you had before you and not at all from your recollection, did you not?

A. Yes.

Q. You ship circus bills and matters of that sort almost daily, do you not?

A. I do.

Q. And it would be impossible for you to remember the date of shipping these particular bills, would it not?

A. It would.

Q. You do remember, however, as you have testified, that all three boxes were shipped at the same time to the agent of the Wallace Show at Peru, Ind., do you not?

A. I do.

Q. Each box contained one kind of bills, one of them containing Exhibit "A" or similar bills, another containing duplicates of Exhibit "B" and another duplicates of Exhibit "C." Is that correct?

A. No, sir. There were three boxes, but they contained many different bills besides these three. The bills were packed in the different boxes according to their size. There were some of each design in each box. The reason for this is that there were different sizes of each design, for instance, Exhibit "A," "The Statuary Act Design," just shown me, is what we call one sheet, as are also Ex. "B" and "C." There were 216 each of duplicates of A, B and C Exhibits. Then there were 72 each of Statuary Act Design and Stirk Family Design in what we call 12-sheet form, being a larger size and 72 of the Spectacular Ballet Design in what we call the 15-sheet size, and also 144 of what we call 1-2-sheet size of the Stirk Family Design. There were other bills in this shipment entirely different, which I have not specified.

Q. Your answer to this last question is not given from your memory, but by referring to a record, is it not?

A. Yes, sir.

Q. Who keeps this record?

A. I do.

Q. Will you please tear out a sheet from this record and attach to this your deposition in order that we may see a form in which you keep this record?

A. Yes, sir, I now do so. Same is received and marked Exhibit "D."

Q. Do you know what these different articles you have described, including Ex. A, B and C, and including the different sizes you have described, are used for?

A. They are used for advertising purposes for circuses.

Q. They were the first bills you shipped of Ex. A, B and C?

A. They were.

Q. And all three were shipped April 11, the time you stated?

A. They were.

Q. You have testified that they were due in Peru, April 15, 1898. How do you fix this date?

A. They were undoubtedly ordered due there at that time.

Q. But how do you know they were ordered due there at that time?

A. My shipping order was marked to be due there at that time.

Q. Who gave you this order?

A. It was sent us from the office.

Q. And came from some member of the Courier Co.?

A. It did.

Q. And that is the extent of your knowledge concerning it, is it?

A. Yes, except that I can tell by the handwriting; it was the handwriting of John A. Rudolf, the Manager.

Q. Do you know of your own knowledge whether these goods were shipped by freight or express?

A. By freight.

Q. And do you know of your own knowledge how long it would take these goods to reach Peru, Ind., from Buffalo by freight?

A. I could not tell.

Q. Then when you testified in direct examination that these articles were due in Peru, Ind., April 15, 1898, you referred solely and only to the fact that they were ordered to be delivered there on or before that date, April 15, 1898. Is this correct?

A. Yes, sir.

Q. Do you know who ordered them to be delivered there on or before April 15?

A. I do not.

Q. You only know the order that came to you that you have already mentioned, do you?

A. Yes, sir.

Q. You have testified that all of the duplicates of Exhibits A, B and C contained the words "Copyright, 1898, Courier Litho. Co., Buffalo, N. Y." How do you know this, if at all?

A. Because I am the one that sees that the articles are sent to Mr. Edward Rudolf, who is the one who attends to having these articles copyrighted.

Q. Then Mr. Rudolf would know about this feature of it, would he?

A. He would know whether those words Copyright, &c., were on the stone.

Q. What would you know, if anything, of your own knowledge as to whether the words "Copyright, 1898, Courier Litho. Co., Buffalo, N. Y.," were or were not on the sheets shipped, as you have testified, to Peru, Ind.?

A. I know of my own knowledge that the words "Copyright, &c.," were on the stone, and therefore must be on all the bills, and I packed the bills.

Re-direct Examination.

The record which I have here and which I show and from which I have testified is in my own handwriting, and it was made at the time, i. e., April 11, 1898. I have a general recollection of this shipment, but have to refer to this record to refresh my memory as to details. When in my cross-examination the counsel used the words "on or before" with reference to April 15, 1898; I gave my answer without thinking of the word "before." I know nothing about that word being in the order. I know that the words "Copyright, 1898. Courier Litho. Co., Buffalo, N. Y.," were on the larger bills as well as on the small bills we have here, and which are marked Exhibits A, B and C.

Re-cross Examination.

Q. You have testified on re-direct examination that you have a general recollection of packing these bills, which you refreshed by referring to records. So far as dates are concerned you have no recollection, have you, but rely entirely upon the record?

A. Yes, sir.

John G. Miller.

Taken, read over, subscribed and sworn to before me this 4th day of December, 1899.

Henry B. Loveland,
Notary Public,
(Seal.) Erie County, N. Y.

Burt J. Hagle, being first duly cautioned and sworn, deposes and says, on being questioned by Mr. Geo. T. Hogg, counsel for plaintiff:

I reside at 750 Humboldt Pky., Buffalo, N. Y. I am the shipping clerk of the Courier Co., and have been for 10 years last past. I keep a book of shipments that I make for the Courier Company. I have here with me that record book. I am making shipments constantly

and can not remember any particular shipment except by reference to my books.

Q. Will you examine your book as to April 11, 1898, and tell us what you have there?

A. I have here "Buffalo, N. Y., April 11, 1898, Wabash R. R. Co. rec'd from the Courier Co. three boxes Adv. matter, 1,760 lbs., marked W. R. Musgat, Agt. Wallace Shows, Car 1, Peru, Ind. Paid owners risk. Charges $7.74."

Q. What was that you just read?

A. That is the original receipt of the Wabash R. R., bearing the signature of George R. Layher.

Cross-Examination.

Q. Do you know the contents of these boxes?

A. No, sir.

Burt J. Hagle.

Taken, read over, subscribed and sworn to before me this 4th day of Dec., 1899.

Henry B. Loveland,
Notary Public,
(Seal.) Erie County, N. Y.

George A. Scheffler, being first duly cautioned and sworn, and upon examination by Geo. T. Hogg, Esq., of counsel for plaintiff, deposes and says:

I am George A. Scheffler. I reside at No. 115 West Mohawk Street, Buffalo, N. Y. My business is journal clerk in the Courier Company and assistant to the manager.

Q. Did you during the year 1898 keep the accounts of the Courier Co. with the Wallace Shows?

A. Yes.

Q. From whom did you receive the items of work charged against the Wallace Show people?

A. From Mr. Miller, i. e., John G. Miller.

Q. What is the date of the first items for bills known as "Statuary Act Design," "Spectacular Ballet Design" and "Stirk Family Design"?

A. April 11, 1898.

Q. Did you make out bills from the books kept by you and render them to the Wallace Show people?

A. Yes.

Q. Were those bills paid?

A. Yes.

Q. You have refreshed your recollection of the dates you have given from your books?

A. I have.

Q. Do you know the date that the first shipment of the bills mentioned were ordered for, and the place where they were to be on the day for which they were ordered?

A. I know the day mentioned on the order slip showing when the bills were due.

Q. When was that?

A. April 15, 1898.

Q. Where?

A. Peru, Ind.

On cross-examination by Orris P. Cobb, of counsel for defendant, witness testified as follows:

Q. You have mentioned in your testimony in chief two dates, viz., April 11, 1898, and April 15, 1898. Do you fix these dates simply from a record or records or from your memory?

A. From records.

Q. Entirely from records, do you not?

A. Yes, sir.

Q. What is the Courier Co., a corporation or partnership?

A. I do not know.

Q. The shipment you testified as having been made April 11, 1898, was not a shipment of duplicates of one only of Exhibits A, B and C, but was shipments of duplicates of all three of them, was it not?

A. Yes, all three of them, and also the other bills.

Q. You testified on direct examination that the shipment of duplicates of these three bills which you say were made April 11, 1898, was due in Peru, Ind., April 15, 1898. Explain more fully what you mean by this?

A. The shipment was due on that date as indicated by the slip—the shipping slip sent me by Mr. Rudolf. The date April 15 is the date designated as the time these goods were to reach Peru, Ind.

Q. Explain, if you can, who fixed this date as the time of delivery there—please go into the matter more fully as to how this date was fixed and why.

A. The answer to that will be, that circuses give the date when they want printing at destination, and presumably this date was upon the original order.

Q. You mean that this date was upon an original order left with or sent to the Courier Co. by the proprietor of the Wallace Show, do you?

A. Yes.

Q. And this date was of sufficient importance for the Courier Co. to make a record of. Please explain why it was so important?

A. The shipment was due there April 15, 1898, in order to be in time to go out in their advertising car.

Re-direct.

Q. When, in your examination, you have mentioned books and records, do you mean books and records kept by yourself?

A. Yes.

Q. Is it usual for orders for circus bills to specify the time and place of delivery, that is, orders to the Courier Co., with which you are familiar?

A. Yes, as a general rule.

Geo. A. Scheffler.

Taken, read over, subscribed and sworn to before me this 4th day of Dec., 1899.

Henry B. Loveland,
Notary Public,
(Seal.) Erie County, N. Y.

Said Exhibit "D," attached hereto and made part hereof, bearing the mark "Exhibit, D, H, B, L, Dec. 4|99, and official seal of Henry B. Loveland, notary public in and for Erie county, N. Y., is as follows:

Original Order.	This Shipment.	No. Days. Shipped to Date	On Hand
150 Days.	Days.	Days.	Days.

Shipping List No. 1.

Bills and Printing

Shipped to

The Great Wallace Shows.

To ———————————

——————— Boxes ———————————

Via ——————— R. R. ———————

From the Courier Company.

Buffalo, ——————— 1898.

No. of Sheets.	Name of Bills.	No. per Day.	Total.
15	Ballet	4	
12	General animal	4	

12	Stirk Family, Bicyclists	4
12	Statuary	4
12	Riders	4
12	General Aerial	4
12	Nelson Family, Acrobats	4
9	Lady Flat Race	4
9	Revolving Trapeze	4
9	Hay animals	4
9	Cat animals	4
9	Freaks, curious people	4
9	Elephant and camel race	4
6	Portrait	4
6	Stirk Family, bicyclists	4
6	Statuary	4
6	Special bill—Lady Rider	4
6	Robert Stickney, Jr., bareback rider	4
6	Stilt and comic skaters	4
6	Nelson Family, acrobats	4
4	Chariot race	4
4	Hay animals	4
4	Cat animals	4
4	Female principal	4
4	Ballet	4
4	Aerial	4
2	Menagerie	4
2	Circus	4
2	Hippodrome	4
2	Features	4
2	Spiral Globe	4
2	Parade	4

Window Work.

1	Menagerie	8
1	Circus	8
1	General animal	8
1	Chariot and standing race	8
1	Stirk Family, bicyclists	12
1	Statuary	12
1	Nelson Family, acrobats	12
1	Riders	12
1	Ballet	12
1	Aerial	8
1	Stilt and comical skaters	8
1	Revolving trapeze	8
1	Elephant and camel race	8
1	Portrait	8
1	Freaks, curious people	8

A. Yes.

Q. And this date was of sufficient importance for the Courier Co. to make a record of. Please explain why it was so important?

A. The shipment was due there April 15, 1898, in order to be in time to go out in their advertising car.

Re-direct.

Q. When, in your examination, you have mentioned books and records, do you mean books and records kept by yourself?

A. Yes.

Q. Is it usual for orders for circus bills to specify the time and place of delivery, that is, orders to the Courier Co., with which you are familiar?

A. Yes, as a general rule.

Geo. A. Scheffler.

Taken, read over, subscribed and sworn to before me this 4th day of Dec., 1899.

Henry B. Loveland,
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(Seal.) Erie County, N. Y.

Said Exhibit "D," attached hereto and made part hereof, bearing the mark "Exhibit, D, H, B, L, Dec. 4|99, and official seal of Henry B. Loveland, notary public in and for Erie county, N. Y., is as follows:

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9	Lady Flat Race	4
9	Revolving Trapeze	4
9	Hay animals	4
9	Cat animals	4
9	Freaks, curious people	4
9	Elephant and camel race	4
6	Portrait	4
6	Stirk Family, bicyclists	4
6	Statuary	4
6	Special bill—Lady Rider	4
6	Robert Stickney, Jr., bareback rider	4
6	Stilt and comic skaters	4
6	Nelson Family, acrobats	4
4	Chariot race	4
4	Hay animals	4
4	Cat animals	4
4	Female principal	4
4	Ballet	4
4	Aerial	4
2	Menagerie	4
2	Circus	4
2	Hippodrome	4
2	Features	4
2	Spiral Globe	4
2	Parade	4

Window Work.

1	Menagerie	8
1	Circus	8
1	General animal	8
1	Chariot and standing race	8
1	Stirk Family, bicyclists	12
1	Statuary	12
1	Nelson Family, acrobats	12
1	Riders	12
1	Ballet	12
1	Aerial	8
1	Stilt and comical skaters	8
1	Revolving trapeze	8
1	Elephant and camel race	8
1	Portrait	8
1	Freaks, curious people	8

1 Robert Stickney, Jr., bareback rider.. 8
1-2 Nelson Family, acrobats 8
1-2 Stirk Family, bicyclists 8
1-2 Spiral Globe 8
1-2 Leon and Mule 8

Judge Helm: The marshal informs me that the electrotype plates referred to in his testimony are over on Monmouth street, Newport. Will it be necessary to have them here this afternoon?

Mr. Kittredge: It is not necessary until to-morrow morning. I would say that if I can have an opportunity to confer with my client about it, I will try to dispense with their coming here. I will try to do so during the adjournment.

Judge Helm: I simply ask for the convenience of the marshal.

At a later stage of the proceedings, to wit, during argument, while the jury were withdrawn, the court suggested to counsel for defendant that it would be well to admit that the electrotype plates should be considered as offered, to which counsel for defendant replied: "I will agree to that; want to anyhow."

The Court: I want to get it straightened out, if you please. Which one of these designs did the letter of April 9, 1898, refer to?

Mr. Hogg: The letter to the Librarian of Congress referred to the Spectacular Ballet and the Stirk Family designs; and the letter of April 15th referred to the Statuary Act Design.

Mr. Kittredge: I have not seen those letters, if your honor please. They were not permitted to be shown me.

The Court: I want to know definitely also whether these copies were sent by mail.

Mr. Hogg: Those sent on April 9th were sent by express. Those on April 15th went by mail.

Mr. Kittredge: Not in a registered letter?

The Court: That does not make any difference if they went by mail.

Mr. Hogg: Now, Mr. Kittredge, there are the two letters. You can examine them at your leisure.

The Court: Which went by express of those two?

Mr. Hogg: The last one was sent by mail. I will also offer in evidence the acknowledgment by the Librarian of Congress of the receipt of those letters.

Mr. Kittredge: The letters of the Librarian of Congress are not competent in evidence. If you offer them, I object.

The Court: The filing in the department is sufficiently shown by the undenied averments of the petition itself, and the certificates you have already offered in evidence. Outside private letters we are not concerned with. You may consider in evidence the certificates Mr. Helm holds in his hand. (Referring to "plffs' Exhibit E, 12|12|99, D. A. B.," heretofore set out.)

Mr. Hogg: I will offer in evidence the official receipt, bearing the postmark and official signature of the Librarian of Congress, of a letter and the title of description that was mailed April 15th.

The Court: You have already introduced official evidence of that.

Mr. Hogg: The distinction is that this is the official certificate which shows when it was received in Washington. The receipt also shows the day it was mailed.

Judge Helm: Your honor takes judicial notice of the signature of all executive officers under the statute.

The Court: All official papers, of course. Let them be tendered.

(Same now received in evidence and marked "Plffs' Exhibit M, 12|12|99, D. A. B.," being an official postal card bearing upon its address side the following:

"Librarian of Congress,

Office of the Register of Copyrights.

Official Business.

Penalty for Private Use, $300.00.

The Courier Litho. Co. Buffalo, N. Y."

And the reverse of said postal card containing the following printed matter, which was read to the jury, to wit:

Library of Congress,

Washington.

Office of the Register of Copyrights.

April 30, 1898.

The Courier Litho. Co,:

Dear Sirs—In accordance with the application contained in yours of 15th copyright entry has been made un-

der date of April 18, 1898, for your lithos entitled "Statuary Act Design," and one other title.

Copyright certificate will follow in about 40 days.

Respectfully,

John Russell Young,

Librarian of Congress.

By Thorvald Solberg,

Register of Copyrights."

"Notice of copyright entry A."

And said postal card further having stamped with rubber stamp across the reverse side thereof the following: "Received May 2, 1898."

The Court: Now, on April 30, the Librarian writes that on April 18th it was received?

Judge Helm: Yes, his letter dated the 15th—that is the Statuary Act Design.

Mr. Kittredge: That relates only to the Statuary Act Design.

The Court: You have no such paper relating to the other two?

Mr. Hogg: The others were sent by express; so we rely upon the dates as shown by those certificates included in plaintiffs' Exhibit E. The others we rely upon the date they were mailed, because those referred to in Exhibit E were sent by express, which the statute does not seem to comtemplate.

And thereupon the plaintiffs rested their cause.

And the foregoing together with the exhibits referred to therein and made a part hereof is all the testimony and evidence offered or given by the plaintiff upon the trial of this cause.

Mr. Kittredge: I want to move to exclude specifically each of these Exhibits A, B and C; and I want also at this stage of the case to ask for peremptory instructions for the defendant. I should like to be heard on this subject.

The Court: State why in a word.

Mr. Kittredge: In the first place, if your honor please, I want to say with reference to the Statuary Exhibit—I will make my special objection first with reference to that Statuary Exhibit—it is alleged in the petition and is in fact copyrighted on the 18th of April, and the publication plainly shows it was prior to that. That is a specific objection to that one upon that ground specifically—that is the statuary.

The Court: Now, as to the other two?

Mr. Kittredge: The specific objection to this one, the Ballet, is that it is an immoral picture; and the general objection that I make to them all is, that they are none of them subject matter of copyright. They are all mere matter of advertising.

The Court: I should like to know whether any of your witnesses will prove, so far as you have them here, the arrival of those boxes of goods before the 11th of April?

Mr. Kittredge: We have already proved they were due on the 15th. Our witness will be here in the morning, Mr. Wallace, who will testify, I think, that they were received at or before that date.

The Court: "At" might not be important; "before" may be very important.

Mr. Kittredge: The 15th is before the 18th, and on their own testimony this was published before copyright was taken.

The Court: If I understand you, you move first to exclude those Exhibits A, B and C, and then move for peremptory instructions?

Mr. Kittredge: Yes, sir.

At a later stage the court announced that defendant's motion to exclude Plaintiffs' Exhibits A, B and C was overruled.

(To which overruling of their said motion by the court to exclude said exhibits, defendant, by counsel, then and there excepted.)

The Court having duly cautioned the jury, excused them until 9:00 a. m., Wednesday, December 13, 1899, whereupon the jury withdrew from the court room and argument proceeded upon the pending motion, and particularly as to that branch of the same covering defendant's motion for peremptory instructions in its favor and against the plaintiffs, and the court, being sufficiently advised by counsel reserved its ruling on the motion for the present, and adjourned until 9:00 a. m., Wednesday, December 13, 1899.

Second day, Wednesday, Dec. 13, 1899.

Court met pursuant to adjournment. Now come again the jury impaneled herein, and hearing of this cause resumed.

And the court having heard the objections by counsel for plaintiffs to the granting by it of the pending motion for peremptory instructions to the jury to find for the de-

fendant and being sufficiently advised, upon consideration the court delivered a written opinion, to wit:

United States Circuit Court, District of Kentucky, sitting at Covington.

George Bleistein, John W. Bridgman, John A. Rudolf, Ansley Wilcox, Gerritt B. Lansing and Edwin Fleming, doing business under the name of the Courier Company and the Courier Lithographing Company, Plaintiffs,

vs.

The Donaldson Lithographing Company, Defendant.

This is an action to recover $12,000.00 for the alleged infringement by the defendant of certain copyrights, being at the rate of $1 each for all the copies of the things copyrighted which were found in the possession of the defendant. The claim to this sum of money is based upon Section 4965, of the Revised Statutes of the United States, which as amended, reads as follows:

"Section 4965. If any person, after the recording of the title of any map, chart, dramatic or musical composition, print, cut, engraving, or photograph, or chromo, or of the description of any painting, drawing, statue, statuary or model or design intended to be perfected and executed as a work of fine arts, as provided by this act, shall, within the term limited, contrary to the provisions of this act, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, engrave, etch, work, copy, print, publish, dramatize, translate, or import, either in whole or in part, or by varying the main design with intent to evade the law, or knowing the same to be so printed, published, dramatized, translated or imported, shall sell or expose to sale any copy of such map or other article, as aforesaid, he shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale; provided, however, that in case of any such in-

fringement of the copyright of a photograph made from any object not a work of fine arts, the sum to be recovered in any action brought under the provisions of this section shall be not less than one hundred dollars, nor more than five thousand dollars, and, provided, further, that in case of any such infringement of the copyright of a painting, drawing, statue, engraving, etching, print or model or design for a work of the fine arts, or of a photograph of a work of the fine arts, the sum to be recovered in any action brought through the provisions of this section shall not be less than two hundred and fifty dollars, and not more than ten thousand dollars. One-half of all the foregoing penalties shall go to the proprietors of the copyright and the other half to the use of the United States."

The three subjects of copyright described in the plaintiffs' petition, are, first, an engraving called "Spectacular Ballet Design," which is made up of a line of a dozen or more figures of females in ballet costumes of the most flashy style; second, an engraving called the "Stirk Family Design," which is a series of representations of fancy or trick bicycle ridings; and, third, an engraving called the "Statuary Act Design," which is made up of pictures of certain statuary. Each of the engravings was designed and engraved at Buffalo, N. Y., and at least one of them by an employe of the plaintiffs, the Courier Company, and all were designed for use of show bills, and as advertisements for the Wallace Circus.

The proof does not appear to warrant a claim (and which, indeed, is not made), that there was any infringement of a copyright of a photograph made from an object not of the fine arts, which would be a case that would limit the recovery of any sum between $100.00 and $5,000.00, as fixed in the proviso of the section just copied. The broad claim made in the plaintiffs' petition is that they are entitled to recover under the clauses of the section which fix the sum to which they are entitled at $1 per sheet. The court, however, is strongly inclined to the opinion that if the plaintiffs are entitled to recover at all the limits for such recovery are between $250.00 and $10,000.00, as fixed in the last clause of the section above copied, as, if there is any infringement, it may be of the copyright of a "print." In any event there is raised a very important question, and one which, in this case, and in one which came before me at the last term, has received my most careful consideration.

Clause 8, of Section 8, of the Constitution of the United States, among other things, gives to Congress power "to

promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

In attempting to exercise that power Congress has made statutory provisions relating to the subject of copyrights. Among those provisions are Secs. 4952, 4956, 4957, 4962, and 4965 of the Revised Statutes. The first two of these, as amended, and so far as applicable to this case, read as follows:

"Section 4952. The author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary or of models or designs intended to be perfected as works of the fine arts, and the executors, administrators, or assigns, of any such person shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same. . . .

"In the construction of this act the words 'engravings,' 'cut,' and 'print,' shall be applied only to pictorial illustrations or works connected with the fine arts, and no prints or labels designed to be used for any other articles of manufacture shall be entered under the copyright law, but may be registered in the patent office."

"Section 4956. No person shall be entitled to a copyright unless he shall on or before the day of publication, in this or any foreign country, deliver at the office of the Librarian of Congress, or deposit in the mail within the United States, addressed to the Librarian of Congress, at Washington, District of Columbia, a printed copy of the title of the book, map, chart, dramatic or musical composition, engraving, cut, print, photograph or chromo or a description of the painting, drawing, statue, statuary or a model or design, for a work of the fine arts, for which he desires a copyright; nor unless he shall also, not later than the day of the publication thereof, in this or any foreign country, deliver at the office of the Librarian of Congress, at Washington, District of Columbia, two copies of such copyright book, map, chart, dramatic or musical composition, engraving, chromo, cut, print or photograph, or in case of a painting, drawing, statue, statuary, model or design for a work of the fine arts, a photograph of the same; provided, that in the case of a book, photograph, chromo or lithograph, the two copies of the same required to be delivered or deposited as above shall be printed from type set within the limits of the

United States, or from plates made therefrom, or from negatives or drawings on stone made within the limits of the United States, or from transfers made therefrom."

It will be seen that the prime question is whether the things copyrighted here are pictorial illustrations connected with the fine arts, or are such as are intended to be perfected as works of the fine arts. That this must necessarily be the question in this connection seems to be apparent from the language of that part of Section 4952 in regard to the construction of the words "engraving," "cut" and "print" as used in the statute. The statute provides that those words "shall be applied only to pictorial illustrations or works connected with the fine arts." If the words "pictorial illustrations" are to be taken independently of the words which follow, then it must be determined whether the things copyrighted here, or any of them, are "pictorial illustrations" within the intent of the legislation. I think that no one of them is. On the contrary, I think that Congress meant by those words, a pictorial representation placed in a book or other publication, to elucidate the text.

In defining the word "illustration" the Century Dictionary used substantially that language.

If, however, disregarding this view, we are to construe the words "pictorial illustrations" in connection with the words "or works connected with the fine arts," then the plaintiffs' claim has quite as little support, inasmuch as works which are connected with a "cut" or "engraving" or "print" must necessarily be "pictorial illustrations" in a certain sense. If all parts of the language are to be construed as having reference to the fine arts, then in order to bring out the real meaning, we may disregard the words "or works," and correctly read the clause as though it read that in construing the words "engravings," "cut" and "print," they shall be held to apply only to "pictorial illustrations connected with the fine arts." But whether this is correct or not, the things copyrighted in this case in my judgment are neither "pictorial illustrations" nor "works connected with the fine arts," within the meaning of the law.

That there is a distinction between the useful arts and the fine arts is a fact which we must assume to exist, not only as matter of common knowledge, but from cases like Almy vs. Jones, 17 Rhode Island, 266, and from the definitions found in the dictionaries. For example, the fine arts are defined to be "those which seek expression through beautiful modes."

It may be altogether undesirable to undertake to fix

or describe in any set phrase the line of difference between the two. It may indeed be quite as difficult as it is undesirable to do so, but that there is a difference will be assumed by the court.

Inasmuch as the constitutional provision above referred to only authorizes Congress to promote the "useful arts," the curious might moot the question of the power to promote any but the useful arts, and consequently the lack of power to legislate to give exclusive privileges respecting the fine arts, unless in cases where they are also useful arts; but the court is limited to a consideration of the intention of Congress in the legislation regarding the fine arts which is thought to authorize this action, and the recovery of the enormous penalties demanded for the printing of the cheap show bills upon which the claim is based. The court in considering this case is limited to that because in its judgment that is the only question to be decided on the pending motion, though it involves, of course, the question of the validity of each of the copyrights mentioned. If the things copyrighted in this case do not come within the Statute, there is no occasion to go further.

That the pictures offered in evidence in this case are such as are connected with the fine arts, I do not for a moment agree, nor does the evidence leave any question upon the subject, which the court thinks it necessary to submit to the jury. That the picture which represents a dozen or more figures of women in tights with bare arms and with much of the shoulders displayed, and by means of which it is designed to lure men to a circus, is in any sense a work of the fine arts, or are pictorial illustrations in the sense of the statute, I do not believe. The court does not think that it was in any wise intended by Congress that such a picture should be the subject of the exclusive advantages given by the privilege of copyrighting. Instead of being either useful art or fine art, it is something to be regarded as merely frivolous, and to some extent immoral in tendency, though the court by no means intends to intimate that the nude is not perfectly admissible in the fine arts.

The same conclusion, but upon somewhat different reasons, might apply to the picture called the "Stirk Family Design," which, as we have seen, is only an illustration of trick or fancy bicycle riding.

As to the other picture, that known as the "Statuary Act Design," the same conclusions might generally be applied, but the proof appears to be that the copyright of this one is void upon another ground, viz., that it was

printed and a number of copies of it shipped to the circus agent as many as four days before the copies were either mailed or delivered to the Librarian of Congress in compliance with the provisions of Section 4956, and instead of being entitled to recover as to this particular picture, the plaintiffs having, before it was granted, marked upon it a statement that it was copyrighted, may have brought themselves within the penalty for that offense provided in Section 4963. And if the court were to submit the case to the jury at all it would also be its duty to comment upon that portion of the evidence of the plaintiffs which seemed to indicate a possible publication of the two other pictures before the time of application for the copyright.

The court, indeed, might have grave doubts whether the Courier Litho. Co., which is a mere trade name of a certain department of the business of the unincorporated association known under the laws of New York as the Courier Company, is or can be the author, inventor, designer or proprietor of any of the things copyrighted within the meaning of Section 4952. The Courier Litho. Co. is a legal nonenity—that is to say, it is not a natural or legal person with any power to be a proprietor; it is certainly not the author, inventor or designer of the things copyrighted, and how it, under the circumstances, can be the proprietor of it is not clear to the court. Nor has any title in it been shown, unless it be that a title would result from the fact that a designer in the employ of the Courier Company designed one, or possibly two, of the pictures, though plaintiffs do not make it at all clear who designed any but the Statuary Act Design. Certainly it is not made clear that they, or any employe of theirs, designed either of the others.

Of course, the Librarian of Congress does not inquire into the matter of right when granting a copyright. He only states who claims the title, and leaves the courts to pass upon its validity. And notwithstanding the cases of Colliery, etc., Co. vs. United States, etc., Co., 94 Fed. Rep. 153, and Werckmeister vs. Pierce, etc., Co., 63 Fed. Rep. 445, and Scribner vs. Clark, 50 Fed. Rep. 473, and Lawrence vs. Dana, 15 Fed. Cases, and Callaghan vs. Myers, 126 U. S. 617, which discuss a general proposition, I would be in much doubt about the right of the Courier Litho. Co. to two of these copyrights in view of the evident design of the constitutional and statuary provisions to which I have referred to give the inventor or author the exclusive right, although if the six other plaintiffs had obtained the copyrights in their own individual names, or in that of the unincorporated association recognized

by the laws of New York, it might be that the court should not hold that the actual inventor might not have previously transferred his rights by acts in pais, or by such as should be construed to be an equitable assignment of those rights. The trouble in this case is that there was never any sort of transfer, equitable or otherwise, to the Courier Litho. Co., and that no right, therefore, existed in that unreal concern. It had no legal right to own or to be the proprietor of anything. These remarks do not apply to the Statuary Act Design, because in that case the copyright was granted to the Courier Company.

However, the court does not feel called upon to pass definitely upon this question, as in its opinion, the case must turn upon the others, and especially upon the general proposition that the things copyrighted in this case were by no means such as either the constitution or the legislation of Congress intended to protect by the privilege of copyrights. The court can not bring its mind to yield to the conclusion that such tawdry pictures as these were ever meant to be given the enormous protection of not only the exclusive right to print them, but the additional protection of a penalty of a dollar each for reprints from them.

As previously stated, they are neither "pictorial illustrations" nor "works connected with the fine arts" within the meaning of Section 4952. Not being so, there was no authority to grant the copyrights, whether the constitution authorizes Congress to promote the fine arts or not.

The judgment of the court is, that the plaintiffs, on their own showing, are not entitled to recover, and for that reason the motion of defendant will be granted, and I will instruct the jury to find a verdict for it.

Walter Evans, Judge.

Dec. 13, 1899.

And thereupon the court sustained the motion of the defendant and instructed the jury to find for it, and so charged the jury; to which the plaintiff, by counsel, in the presence of the jury, excepted.

And thereupon, in accordance with said instruction of the court, the jury returned a verdict in the words and figures following, to wit:

We, the jury, find for the defendant.

The court thereupon entered judgment in favor of the defendant and against the plaintiffs, which judgment was and is in the words and figures following, to wit:

It is ordered that the defendant have and recover of the plaintiffs the costs herein had and expended to be taxed by the clerk.

To which order of said court entering said judgment the plaintiff, by counsel, then and there excepted, and upon motion of the plaintiffs, by counsel, the plaintiffs are allowed sixty days to prepare and present their bill of evidence and exceptions herein.

And now comes the plaintiffs, by counsel, and tender in open court this their true bill of exceptions herein, and pray that the same may be allowed, signed, sealed and made a part of the record in this cause, and which is accordingly done this 20th day of January, A. D. 1900.

Witness the hand and seal of the court.

Walter Evans, Judge.

United States of America, District of Kentucky, ss.:

I, Jos. C. Finnell, Clerk of the Circuit Court of the United States for the Sixth Judicial Circuit and District of Kentucky, at Covington, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the cause set out in the caption hereto, as the same appears of record and on file in the clerk's office of said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Covington, Kentucky, this 8th day of January, 1900.

(Seal.) Jas. C. Finnell, Clerk.

United States Circuit Court of Appeals for the Sixth Circuit.

United States of America, Sixth Judicial Circuit, ss.:

The President of the United States, to the Honorable the Judge of the Circuit Court of the United States for the District of Kentucky—Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between George Bleistein, John W. Bridgman, John A. Rudolph, Ansley Wilcox, Gerritt B. Lansing and Edwin Fleming, doing business under the name of the Courier Company and the Courier Lithographing Company, plaintiffs, and The Donaldson Lithographing Company, defendant, a manifest error hath happened, to the great damage of the said George Bleistein, John W. Bridgman, John A. Rudolph,

Ansley Wilcox, Gerritt B. Lansing and Edwin Fleming, doing business as the Courier Company and the Courier Lithographing Company, as by judgment complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati, in said Circuit, on the* day of next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of January, in the year of our Lord one thousand nine hundred, and of the Independence of the United States of America the one hundred and twenty-fourth.

(Seal.) Jos. C. Finnell,
Clerk of the Circuit Court of the United States.

Allowed by
Walter Evans, Judge.

*Not exceeding 30 days from the day of signing the citation.

2128. George Bleistein et al., vs. The Donaldson Litho. Co. Writ of Error. Filed Jany. 20, 1900. Jos. C. Finnell, Clerk.

United States Circuit Court of Appeals for the Sixth Circuit.

United States of America, Sixth Judicial Circuit, ss.:

To The Donaldson Lithographing Company—Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the city of Cincinnati, in said Circuit, on the* seventeenth day of February next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the District of Kentucky, wherein George Bleistein, John W. Bridgman, John A. Rudolph, Ansley Wilcox, Gerritt

B. Lansing and Edwin Fleming, doing business as the Courier Company and the Courier Lithographing Company, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 20th day of January, in the year of our Lord one thousand nine hundred, and of the Independence of the United States of America the one hundred and twenty-fourth.

Walter Evans, Judge.

*Not exceeding 30 days from the day of signing.

I hereby certify I received this writ on the 24th day of January, 1900, and that I personally served the same this 25th day of January, 1900, upon said defendant, the Donaldson Lithographing Co., by delivery to Wm. M. Donaldson, its president, a true copy of the within at his residence in Dayton, Ky., on 25th day of January, 1900.

This, therefore, returned executed as the law directs, this 26th day of January, 1900.

Fee, 2.18.

A. D. James, U. S. Marshal,
By J. D. Compton, Deputy.

2128. E—267. George Bleistein et al., vs. The Donaldson Lithographing Co. Citation.

And afterwards to wit on February 10th 1900, præcipe for appearance was filed clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit, October Term, 1899.

GEORGE BLEISTEIN ET AL.
vs.
DONALDSON LITHOGRAPHING CO. } No. 819.

To the clerk of said court:

Please enter my appearance as counsel for the plaintiffs in error.

CHARLES J. HELM.

And afterwards to wit on April 3rd 1900 a stipulation to extend time for preparation of briefs was filed which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

GEORGE BLEISTEIN and Others, Plaintiffs in Error,
vs.
THE DONALDSON LITHOGRAPHING COMPANY, Defendant in Error.

It is hereby stipulated that the plaintiffs in error may have twenty days' further time from the 3rd day of April in which to prepare and file their briefs in this case.

E. W. KITTREDGE &
COBB & HOWARD,
Attorneys for Defendant in Error.

And afterwards to wit on June 7th 1900, an entry was made upon the journal of said court in said cause which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

GEORGE BLEISTEIN ET AL.
vs.
DONALDSON LITHOGRAPHING CO. } Before Judges Lurton, Day, and Severens.

This cause is argued for appellant by Mr. Ansley Wilcox and continued until tomorrow for further argument.

And afterwards to wit on June 8th 1900 an entry was made upon the journal of said court in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

GEORGE BLEISTEIN ET AL. *vs.* DONALDSON LITHOGRAPHING CO. } Before Judges Lurton, Day, & Severens.

This cause is argued further for plaintiffs in error by Mr. Ansley Wilcox and for the defendant in error by Messrs. E. W. Kittredge and Orris P. Cobb and is submitted.

And afterwards to wit on November 7th 1900, judgment was rendered in said cause clothed in the words and figures as follows:

Judgment.

United States Circuit Court of Appeals for the Sixth Circuit.

GEORGE BLEISTEIN ET AL. *vs.* THE DONALDSON LITHOGRAPHING CO. } No. 819.

Error to the circuit court of the United States for the district of Kentucky.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Kentucky, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court, in this cause be and the same is hereby affirmed with costs.

And afterwards to wit on November 20th 1900, an opinion was filed in said cause which reads and is as follows:

Opinion.

United States Circuit Court of Appeals, Sixth Circuit.

THE COURIER LITHOGRAPHING CO., Plaintiffs in Error, *v.* THE DONALDSON LITHOGRAPHING CO., Defendant in Error. } No. 819. Error to the Circuit Court of the United States for the District of Kentucky.

Submitted June 8, 1900; decided Nov. 7, 1900.

Before Lurton, Day, and Severens, circuit judges.

This was an action by the plaintiffs in error based upon section 4965 of the Revised Statutes of the United States as amended by the acts of March 3, 1891, and March 2, 1895, to recover the penalties prescribed for infringement of copyrights. The petition set forth three separate causes of action under that section, and alleged

that the defendant had violated the plaintiffs' copyrights in three different lithograph prints copyrighted under the following titles:

1. "Spectacular ballet design."
2. "Stirk Family design."
3. "Statuary act design."

The marshal seized, on the day the action was begun, 10,590 copies of the infringing publication in an eight-page form, 13,205 copies of a four-page form, and five metal electrotype plates, found in the possession of the defendant. The copyrighted articles are in colors, and are properly chromo-lithographs. The alleged infringements are smaller reproductions, not in colors, made from electrotype plates.

At the conclusion of the evidence for the plaintiffs the court instructed the jury to return a verdict for the defendant. There were some exceptions to the exclusion of evidence offered by the plaintiffs, but none of the errors assigned thereon are material, as the case must turn upon the questions involved in the instruction to find for the defendant.

The plaintiffs sue as members of a joint stock association under the law of New York, known as "The Courier Company," but doing a part of their business under the name of the "Courier Lithographing Company." Two of the copyrights in question were copyrighted in the name of the "Courier Company" and one in the name of the "Courier Lithographing Company," that known under the title of the "statuary design." The titles of the first two named were deposited with the Librarian of Congress April 11, 1898. The last was deposited April 18, 1898, though it was in evidence that the application and title was deposited in the mail addressed to Librarian of Congress on April 15, 1898. A large number of prints of each of said designs were shipped April 11, 1898, by the plaintiff company from Buffalo, N. Y., to the agent of the Wallace circus at Peru, Ind., for circulation and distribution. The time of arrival at Peru is not shown.

The evidence established that these prints were ordered by E. B. Wallace, proprietor of a circus known as the "Wallace show," as advertising matter for the show. Plaintiffs' evidence tended to show that Mr. Wallace's order constituted what is styled an order for "special paper"—that is, they were show-bills designed especially for him, and which are sold only to the person making the order so long as he chooses to supply himself with them for his show. The witness said, that "if he ceases to use that bill, say he does not do the 'Statuary act' next year we have the right to sell the design to other people who may want to use that sort of thing."

Plaintiffs' evidence also tended to show that the "design" or "conception" was that of an employé working under a salary for them, and that his "designs" were the property of the employer, and therefore copyrighted by them.

The spectacular ballet design, as shown by the print itself, is a picture of a number of ballet dancers in the conventional dress, short skirts, tights, bare shoulders and arms. The Stirk Family design is a representation of fancy bicycle riding by male and female riders. The statuary design is a representation of the landing of

Columbus and several other historic or classic events. All purport to be representations of acts to be done in the Wallace show, and all were made under a representation by Wallace that his show was going to do these things, and that he wished these acts represented on colored bills for exhibition in windows as advertisements for his show. All the bills contained reading matter indicating that these were acts to be done in Wallace's show, and included pictures of Mr. Wallace himself. The copies of the several publications, deposited as required by the statutes with the Librarian of Congress, included this reading matter and picture of Mr. Wallace.

By comparing the copyrighted prints with those seized and put in evidence as proof of infringement, it is shown that the latter are also show-bills for the Wallace show. Though diminished in size and printed only in black ink, they appear to be substantially reproductions of the designs in the copyrighted publications. There was no evidence touching the originality of any of these designs other than the general statement of one of the plaintiffs that Mr. Wallace represented that these acts were to be done in his show, and that the designs as copyrighted were "the creations of our employés."

Evans, district judge, was strongly of opinion that none of the copyrighted prints were entitled to be copyrighted, and upon this and other grounds, unnecessary to be now considered, so instructed the jury.

LURTON, circuit judge, having made the foregoing statement of the case, delivered the opinion of the court.

The copyrighted chromos or prints were designed to be pictorial representations of acts done in the Wallace circus. That they were designed and intended for advertising purposes only is undisputable. They may be "creations" in the sense that they are not exact reproductions of the acts they advertise. But that the arrangement, pose, color, grouping or expression is new or original does not appear in the evidence, nor can we assume it from an examination of the prints themselves. Aside from this function as advertisements, we are unable to discover that they have any use whatever, or that they have any intrinsic merit or value. But they are "chromos" or "prints," and chromos and prints are included in the list of productions which, under the statute, may be copyrighted. But are all chromos and prints unqualifiedly entitled to the protection of the copyright law? Must such a construction be given the statute? The power of Congress in this respect is derived from that section of article 1 of the Constitution which gives to it the power "to promote the progress of science and useful arts, by securing for limited terms to authors and inventors the exclusive right to their respective writings and discoveries."

In the Trade-mark cases, 100 U. S. 82, the court held that "while this word *writings* may be liberally construed, as it has been, to include original designs for engravings, prints, etc., it is only such as are original and are founded in the creative powers of the mind."

In Lithographic Co. *v.* Sarony, 111 U. S. 53, the court approved the definition of *author* by Lord Justice Cotton in Nottage *v.* Jackson,

11 Q. B. Div. 627, where the distinguished judge said: "In my opinion, 'author' involves originating, making, producing, as the inventor or master mind, the thing which is to be protected, whether it be a drawing, or a painting, or a photograph."

In the Saroney case, just cited, the court reserved the question as to whether an ordinary photograph was the subject of a copyright, but sustained a copyright upon a finding of fact that it was "a useful, new, harmonious, graceful picture, and that plaintiff made the same entirely from his own original mental conception, to which he gave mental form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies and other accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression." In other words, the court found, that a photograph might be something more than a mere mechanical and chemical product, and might rise to the dignity of art through the blending of the mechanical parts of the process with the original intellectual conceptions of an artist. Commenting upon the fact that under our copyright law it is only necessary to deposit the title and two copies of the publication to secure a copyright, and that no tribunal, as is the case in respect of an application for a patent, is provided for passing upon the originality of the matter offered for copyright, the court in the same case said:

"It is, therefore, much more important that when the supposed author sues for a violation of his copyright, the existence of those facts of originality, of intellectual production, of thought and conception on the part of the author should be proved, than in the case of a patent right."

In Higgins *v.* Keuffel, 140 U. S. 428, the court, referring to the constitutional power of Congress over the subject of copyrights, said:

"It does not have any reference to labels which simply designate or describe the articles to which they are attached, and which have no value separated from the articles; and no possible influence upon science or the useful arts. A label on a box of fruit giving its name as 'grapes,' even with the addition of adjectives characterizing their quality as 'black' or 'white' or 'sweet,' or indicating the place of their growth, as Malaga or California, does not come within the object of the clause. The use of such labels upon those articles has no connection with the progress of science and the useful arts. So a label designating ink as 'black,' 'blue' or 'red' or 'indelible' or 'insoluble,' or as possessing any other quality, has nothing to do with such progress. It cannot, therefore, be held by any reasonable argument that the protection of mere labels is within the purpose of the clause in question. To be entitled to a copyright, the article must have by itself some value as a composition, at least to the extent of serving some purpose other than as a mere advertisement or designation of the subject to which it is attached."

In Baker *v.* Selden, 101 U. S. 99, 106, the court quote- with seeming approval from the case of Cobbett *v.* Woodward, L. R., 14 Eq. 407, where it was held that an illustrated catalogue of furniture was

not the subject of copyright when it was designed "solely for the purpose of advertising particular articles for sale, and promoting the private trade of the publisher by the sale of articles which any other person might sell as well as the first advertiser."

The same ruling was made by Woodruff, circuit judge, in Collender *v.* Griffith, Fed. Cases No. 3,000. Cobbett *v.* Woodward has since been overruled, but, as pointed — by Jenkins, circuit judge, in Mott Iron Works *v.* Clow, 82 F. R. 320, the cases overruling it are to some extent due to the difference between the English statutes and our own, and therefore not pertinent.

In Mott Iron Works *v.* Clow, cited above, the court of appeals for the seventh circuit reached the conclusion that "mere advertisements, whether by letter, press or by pictures, are not within the protection of the copyright law."

The exigencies of the case in hand do not require that we should express any opinion upon the broad subject. It may be that a picture, or lithograph, or engraving, though intended to be reproduced in prints and used as an advertisement, is entitled to the protection of the copyright law, notwithstanding the use for which it is designed.

In Yuengling *v.* Schile, 12 F. R. 97, 101, a chromo entitled "Gambrinus and his followers," intended as a glorification of lager-beer drinking, and designed and circulated as an advertisement of the publisher's business as a lager-beer brewer, was regarded by Brown, district judge, as the proper subject of copyright. The learned judge distinguished the matter from the case of Cobbett *v.* Woodward, Collender *v.* Griffith and Ehret *v.* Pierce, 10, F. R. 553, upon the ground that the copyrighted articles in these cases were not works of art, and had no value as such, and were mere modes of advertising. The chromo of Gambrinus in question, he held, was "a work of the imagination, and has such obvious artistic qualities as in my judgment render it fairly a subject of copyright, without regard to the use which the plaintiff has made or may intend to make of it." To the same effect is the case of Schumaker *v.* Schwencke, 25 F. R. 466, and the case of Lamb *v.* Grand Rapids School Furniture Company, 39 F. R. 474.

What we hold is this, that if a chromo, lithograph or other print, engraving or picture has no other use than that of a mere advertisement, and no value aside from this function, it would not be promotive of the useful arts, within the meaning of the constitutional provision to protect the "author" in the exclusive use thereof and the copyright statute should not be construed as including such a publication if any other construction is admissible. If a mere label simply designating or describing an article to which it is attached, and which has no value separated from the article, does not come within the constitutional clause upon the subject of copyright, it must follow that a pictorial illustration designed and useful only as an advertisement, and having no intrinsic value other than its function as an advertisement, must be equally without the obvious meaning of the Constitution. It must have some connection with the fine arts to give it intrinsic value, and that it shall have is the

meaning which we attach to the act of June 18, 1874, amending the provisions of the copyright law.

We are unable to discover anything useful or meritorious in the design copyrighted by the plaintiffs in error other than as an advertisement of acts to be done or exhibited to the public in Wallace's show. No evidence aside from the deductions which are to be drawn from the prints themselves was offered to show that these designs had any original artistic qualities. The jury could not reasonably have found merit or value aside from the purely business object of advertising a show, and the instruction to find for the defendant was not error.

Many other points have been urged as justifying the result reached in the court below. We find it unnecessary to express any opinion upon them in view of the conclusion already announced.

The judgment must be affirmed.

United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of the record in the case of George Bleistein *et al. vs.* The Donaldson Lithographing Co. No. 819, as the same remains upon the files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

Seal United States Circuit Court of Appeals, Sixth Circuit.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said court, at the city of Cincinnati, Ohio, this 25th day of May A. D. 1901.

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

[Endorsed:] United States circuit court of appeals for the sixth circuit. George Bleistein *et al. vs.* Donaldson Lithographing Co. Certificate for copy of transcript of record.

Supreme Court of the United States.

George Bleistein, John W. Bridgman, John A. Rudolf, Ansley Wilcox, Gerrit B. Lansing, and Edwin Fleming, Doing Business under the Name of The Courier Company and The Courier Lithographing Company, Plaintiffs in Error, *vs.* The Donaldson Lithographing Company, Defendant in Error.	At Law. Petition for Writ of Error.

The petition of the plaintiffs in error above named respectfully shows:

1. That this action was begun in the United States circuit court

for the district of Kentucky, by the plaintiffs in error above named against the defendant in error above named, based upon section 4965 of the Revised Statutes of the United States and amendments thereto, to recover for the violation of the plaintiffs' copyrights in three different chromos or colored lithographic prints, also called chromo-lithographs, copyrighted under the following titles respectively:

(1.) "Spectacular ballet design,"
(2.) Stirk Family design,"
(3.) Statuary act design."

2. That the action was tried at Covington, Kentucky, December 12 and 13, 1899, before Hon. Walter Evans, sitting as circuit judge, and a jury; that at the conclusion of the plaintiffs' evidence the court held, as a matter of law, that the plaintiffs' said chromo-lithographs were not entitled to the benefits of the copyright statutes of the United States, and granted a nonsuit or peremptory direction of a verdict for the defendant; and that judgment was entered on said verdict as follows:

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"It is ordered that the defendant have and recover of the plaintiffs the costs herein had and expended, to be taxed by the clerk."

3. That the plaintiffs in error above named duly sued out a writ of error to the United States circuit court of appeals for the sixth circuit; that all necessary proceedings were thereupon taken, and the case duly presented to said circuit court of appeals; and that said court rendered judgment, on November 7, 1900, affirming the said judgment of the United States circuit court for the district of Kentucky.

4. That the matter in controversy in this case exceeds the sum of $1,000 besides costs; and that the case arose under the copyright laws of the United States and, therefore, is not one in which the determination of the United States circuit court of appeals is final, but is one in which there is, of right, a writ of error or review of the case by the Supreme Court of the United States, as provided in section 6 of the act of Congress entitled "An act to establish circuit courts of appeals, etc." approved March 3, 1891; and that one year has not elapsed since the entry of the judgment sought to be reviewed.

5. That the petitioners, the plaintiffs in error above named, are aggrieved by the said judgment of the United States circuit court for the district of Kentucky, and by the judgment of the United States circuit court of appeals for the six circuit affirming the same; and that errors were committed to the prejudice of the plaintiffs in error on the trial of said action, and in the affirmance of the judgment, which are set forth in the assignment of errors to be filed with this petition.

Wherefore the petitioners, the plaintiffs in error above named, pray that a writ of error may issue in their behalf directed to the United States circuit court of appeals for the sixth circuit to the end that a transcript of the record, proceedings and papers in this action, duly authenticated, may be sent to the Supreme Court of the United States; and that the said judgment of the United States circuit court

of appeals for the sixth circuit and the said judgment of the United States circuit court for the district of Kentucky, be reviewed, the errors complained of corrected, and the said judgments reversed.

Dated, May 18th, 1901.

WILCOX & MINER,
Attorneys for Plaintiffs in Error,
816 *Ellicott Square, Buffalo, N. Y.*

ARTHUR VON BRIESEN,
ANSLEY WILCOX,
Of Counsel for Plaintiffs in Error.

Supreme Court of the United States.

GEORGE BLEISTEIN, JOHN W. BRIDGMAN, John A. Rudolf, Ansley Wilcox, Gerrit B. Lansing, and Edwin Fleming, Doing Business under the Name of The Courier Company and The Courier Lithographing Company, Plaintiffs in Error, vs. THE DONALDSON LITHOGRAPHING COMPANY, Defendant in Error.	At Law. Assignment of Errors.

The plaintiffs in error above named, by Wilcox & Miner, their attorneys, make the following assignment of errors in this action in connection with their petition for a writ of error herein, and allege that in the record and proceedings there is manifest error as follows:

I.

The trial court erred in the rejection of evidence offered by the plaintiffs upon the trial in the following instances:

(1.) In rejecting as evidence the following parts of page 129 of vol. 15, No. 2, whole No. 354, April 20, 1898, of "Catalogue of title entries of books and other articles entered in the office of the register of copyrights, Library of Congress, at Washington, D. C., under the copyright law, wherein the copyright has been completed by the deposit of two copies," which were offered by the plaintiffs, to wit:

"Spectacular ballet design (1898, No. 22,966, Apr. 11, 2 copies received Apr. 11, 1898).

Copyright by Courier Lithographing Company, Buffalo, N. Y."

"Statuary act design (1898, No. 24,345, Apr. 18, 2 copies received Apr. 11, 1898).

Copyright by Courier Lithographing Company, Buffalo, N. Y."

"Stirk Family design (1898, No. 22,959, Apr. 11, 2 copies received Apr. 11, 1898).

Copyright by Courier Lithographing Company, Buffalo, N. Y."

(See printed record in the circuit court of appeals, page 28.)

(2.) In refusing to allow the witness George Bleistein to answer and tell the jury what was the custom of the trade in regard to the

ownership or control of "special matter," which it was avowed he would do as follows: "The custom of the trade when special matter is ordered is that it shall not be used during the continuance of the contract for other parties than those ordering it; but that thereafter it may be used at the pleasure of the company printing it."

(See printed record in the circuit court of appeals, page 33.)

(3.) In refusing to allow the plaintiffs to introduce in evidence a negative and photograph printed from it, of the spectacular ballet design reducing the size of the picture from that of the plaintiffs' chromo-lithographs to that of the prints made by the defendant and seized by the marshal.

(See printed record in the circuit court of appeals, page 41.)

(4.) In refusing to allow the plaintiffs to show by the witness, Bleistein, that the employé, Bandlow, who made the designs of the lithographs, Exhibits "A," "B" & "C," had been engaged in making similar lithographic designs which were copyrighted by the plaintiffs, under the name of the Courier Lithographing Company, as proprietors, during the four years through which it had been shown that he had been employed by the plaintiffs.

(See printed record in the circuit court of appeals, page 35.)

II.

The trial court erred in sustaining defendant's motion to charge the jury to find for the defendant, and in so charging the jury.

III.

The trial court erred in overruling the motion of plaintiffs for a new trial, and in entering judgment in favor of the defendant and against the plaintiffs.

IV.

The circuit court of appeals erred in not reversing the judgment of the trial court, because of the errors above mentioned, and because of any one of said errors, and also erred in affirming the judgment of the trial court.

V.

The trial court and the circuit court of appeals erred in holding that the "statuary act design" was not a proper subject of copyright.

VI.

The trial court and the circuit court of appeals erred in holding that the "Stirk Family design" was not a proper subject of copyright.

VII.

The trial court and the circuit court of appeals erred in holding that the "spectacular ballet design" was not a proper subject of copyright.

Wherefore the plaintiffs in error above named pray for the judgment of this court reversing the judgment of the United States cir-

cuit court for the district of Kentucky in favor of the defendant in error and against the plaintiffs in error above named, entered upon a verdict directed by the court after a trial had on the 12th and 13th days of December, 1899, and also the judgment, rendered November 7, 1900, of the United States circuit court of appeals for the sixth circuit, affirming the same.

Dated, May 18th, 1901.

WILCOX & MINER,
Attorneys for Plaintiffs in Error,
816 *Ellicott Square, Buffalo, N. Y.*

ARTHUR VON BRIESEN,
ANSLEY WILCOX,
Of Counsel for Plaintiffs in Error.

[Endorsed:] Copy. Supreme Court of the United States. George Bleistein and others, doing business as The Courier Company, &c. pl'ffs in error, *vs.* The Donaldson Lithographing Company, def't in error. Petition for writ of error and assignment of errors. Wilcox & Miner, attorneys for pl'ffs in error, office and P. O. address, room 816 Ellicott square, No. 295 Main street, Buffalo, N. Y. Arthur von Briesen, Ansley Wilcox, of counsel.

Bond on Writ of Error to the Supreme Court of the United States.

Know all men by these presents:

That we, George Bleistein, John W. Bridgman and others, doing business as the Courier Company, of Buffalo, New York, as principals, and Worthington C. Miner and Elizabeth Bleistein, of Buffalo, New York, as sureties, are held and firmly bound unto The Donaldson Lithographing Company in the full and just sum of five hundred dollars ($500), to be paid to the said The Donaldson Lithographing Company, its certain attorneys, successors or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the eighteenth day of May in the year of our Lord one thousand nine hundred and one.

Whereas, lately, at a stated term of the United States circuit court of appeals for the sixth circuit, in a suit pending in said court between George Bleistein, John W. Bridgman, John A. Rudolf, Ansley Wilcox, Gerrit B. Lansing and Edwin Fleming, doing business as The Courier Company and The Courier Lithographing Company, plaintiffs in error, and the said The Donaldson Lithographing Company, defendant in error, a judgment was rendered and entered on the 7th day of November, 1900, against the said plaintiffs in error, and in favor of the said defendant in error, affirming the judgment of the United States circuit court for the district of Kentucky, rendered and entered on or about the 13th day of December, 1899; and the said plaintiffs in error having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judg-

ment in the aforesaid suit, and a citation directed to the The Donaldson Lithographing Company citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within — days from the date thereof:

Now, the condition of the above obligation is such that if the said George Bleistein and others, doing business as the Courier Company, &c., plaintiffs in error, shall prosecute their said writ of error to effect, and answer all damages and costs, if they fail to make their appeal good, then the above obligation to be void; else to remain in full force and virtue.

THE COURIER COMPANY,
G. BLEISTEIN, *Pres't.* [L. S.]
WORTHINGTON C. MINER. [L. S.]
ELIZABETH BLEISTEIN. [L. S.]

Sealed and delivered in presence of—
WM. J. P. SEIPP.

Approved June 3d, 1901.
(Signed) JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

STATE OF NEW YORK, } ss:
Erie County, City of Buffalo, }

On this 18th day of May, 1901, before me personally appeared George Bleistein, Worthington C. Miner and Elizabeth Bleistein, each of whom is personally known to me, and known to be the persons who executed the foregoing instrument, and they then severally acknowledged the execution thereof; and the said George Bleistein acknowledged that he executed the same as and for the act and deed of the Courier Company, an unincorporated joint stock association, of which he is the president.

Given under my hand and official seal the day and year first above written.

[L. S.]
WM. J. P. SEIPP,
Notary Public in and for Erie County, N. Y.

STATE OF NEW YORK, } ss:
Erie County, City of Buffalo, }

Worthington C. Miner and Elizabeth Bleistein, the sureties in the foregoing bond, being severally duly sworn, each for himself or herself does depose and say:

The said Worthington C. Miner, that he is a householder residing in the city of Buffalo, New York, and is worth the sum of $1,000. over and above all debts and liabilities, and not including property which is exempt by law from execution;

And the said Elizabeth Bleistein, that she is a freeholder and householder residing in the city of Buffalo, New York, and that she

is worth the sum of $1,000 over and above all debts and liabilities, and not including property which is exempt by law from execution.

WORTHINGTON C. MINER.
ELIZABETH BLEISTEIN.

Subscribed and sworn to before me this 18th day of May, 1901.

[L. S.] WM. J. P. SEIPP,
Notary Public in and for Erie County, N. Y.

[Endorsed:] Copy. Supreme Court of the United States. George Bleistein and others, doing business as The Courier Company, &c. pl'ffs in error, *vs.* The Donaldson Lithographing Company, def't in error. Bond on writ of error. Wilcox & Miner, attorneys for pl'ffs in error, office and P. O. address, room 816 Ellicott square, No. 295 Main street, Buffalo, N. Y. Arthur von Briesen, Ansley Wilcox, of counsel.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the sixth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals before you, or some of you, between George Bleistein, John W. Bridgman, John A. Rudolph, Ansley Wilcox, Gerritt B. Lansing and Edwin Fleming, doing business under the name of The Courier Company and The Courier Lithographing Company, plaintiffs in error, and The Donaldson Lithographing Company, defendant in error, a manifest error hath happened, to the great damage of the said plaintiffs in error as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 3d day of June, in the year of our Lord one thousand nine hundred and one.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit,* } ss:

In pursuance to the command of the foregoing writ of error I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, herewith transmit a true copy of the record, assignments of error and bond and all proceedings in this case of George Bleistein *et al. v.* The Donaldson Lithographing Company lately pending in the United States circuit court of appeals for the sixth circuit, under my hand and the seal of said court.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 8th day of June, in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States of America the one hundred and twenty-fifth.

Seal United States Circuit Court of Appeals, Sixth Circuit.

FRANK O. LOVELAND,
Clerk United States Circuit Court of Appeals for the Sixth Circuit.

[Stamp:] Filed Jun- 8 1901 Frank O. Loveland, clerk.

UNITED STATES OF AMERICA, ss:

To The Donaldson Lithographing Co., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the sixth circuit, wherein George Bleistein, John W. Bridgman, John A. Rudolph, Ansley Wilcox, Gerritt B. Lansing and Edwin Fleming, doing business under the name of The Courier Company, and The Courier Lithographing Company are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this 3d day of June, in the year of our Lord one thousand nine hundred and one.

(Signed) JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

I hereby, this 24th day of June, 1901, accept due personal service of this citation on behalf of The Donaldson Lithographing Company, defendant in error.

ORRIS P. COBB,
JOSEPH WELBY,
E. W. KITTREDGE,
Solicitors for Defendant in Error.

[Endorsed:] File No. 18,199. Supreme Court U. S., October term, 1901. Term No. 346. George Bleistein *et al.*, P. E., *vs.* The Donaldson Lithographing Co. Copy of citation & acknowledgment of service of same. Office Supreme Court U. S. Filed Jul-2 1901. James H. McKenney, clerk.

Endorsed on cover: File No. 18,199. U. S. C. C. of appeals, 6th circuit. Term No. 346. George Bleistein, John W. Bridgeman, John A. Rudolph, Ansley Wilcox, Gerritt B. Lansing & Edwin Fleming, doing business under the name of The Courier Company & The Courier Lithographing Company, plaintiffs in error, *vs.* The Donaldson Lithographing Company. Filed June 11th, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1902. No. 117.

GEORGE BLEISTEIN, JOHN W. BRIDGMAN, JOHN A. RUDOLF, ANSLEY WILCOX, GERRITT B. LANSING and EDWIN FLEMING, doing business under the name of THE COURIER COMPANY and THE COURIER LITHOGRAPHING COMPANY *Plaintiffs in Error,*

AGAINST

THE DONALDSON LITHOGRAPHING COMPANY, *Defendant in Error.*

} *At Law.*

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

This action comes before the Supreme Court upon writ of error to the Honorable, the Judges of the United States Circuit Court of Appeals for the Sixth Circuit (Record, page 83), which court heard it on writ of error directed to the United States Circuit Court for the District of Kentucky. (Page 20.)

The Circuit Court, at the close of plaintiffs' case, instructed the jury to find a verdict for defendant, which was done and judgment entered thereon. The Circuit Court of Appeals affirmed said judgment.

The action was begun on June 10th, 1899, by filing the declaration (called "petition" in Kentucky) of plaintiffs in error (page 2), alleging that defendant in error had violated three certain copyrights granted to the plaintiffs in error in April, 1898, for three picture-posters or show-bills, described in the declaration as "lithographic prints, cuts or engravings," more accurately *chromo-lithographs*, entitled "Spectacular Ballet Design," "Stirk Family Design" and "Statuary Act Design."

The certificates of copyright are set out in the declaration. (Pages 3, 5 and 6.)

The plaintiffs' three causes of action were all based upon Sec. 4965 of the Revised Statutes, quoted on page 60. By order of the Circuit Court, dated June 10, 1899, the marshal seized 10,590 eight-page prints and 13,205 four-page prints, described in the writ, and also five metal electrotype plates, all of which he found in the defendant's possession. (Page 13.)

The action was tried at Covington, Kentucky, on December 12th and 13th, 1899, before Hon. Walter Evans, sitting as Circuit Judge, and a jury. The testimony and all the proceedings will be found on pages 23 to 59 of the record. The plaintiffs examined six witnesses and introduced numerous exhibits, among them the copyrighted prints and the documents pertaining to the copyrights, and the counterfeits manufactured by the defendant, against which the action was directed.

At the outset of the trial, during the direct examination of the first witness, the court anticipated the question upon which it afterwards took the case away from the jury and decided it, by the following remark. (Page 28):

> "The Court: *The real controversy will be whether this is a subject of copyright, whether it comes within the copyright law.*"

At the close of the plaintiffs' case, defendant moved for "peremptory instructions for the defendant". (Page 58.) The court said, "State why, in a word," to which defendant's counsel answered:

> "Mr. Kittredge: In the first place I want to say with reference to the Statuary Exhibit. * * * It is alleged in the petition, and is in fact copyrighted on the 18th of April, and the publication plainly shows it was prior to that. That is a specific objection to that one upon that ground specifically—that is the Statuary."
>
> "The Court: Now as to the other two."

"Mr. Kittredge: The specific objection to this one, the Ballet, is that it is an immoral picture.

"*And the general objection that I make to them all is that they are none of them subject matter of copyright. They are all mere matter of advertising*". (Page 59.)

The court took a recess, and the next day delivered a written opinion (pages 60 to 66), which concludes as follows:

"The case must turn upon the others (other questions), and especially upon the general proposition that the things copyrighted in this case were by no means such as either the constitution or the legislation of Congress intended to protect by the privilege of copyright. The court cannot bring its mind to yield to the conclusion that such tawdry pictures as these were ever meant to be given the enormous protection of not only the exclusive right to print them, but the additional protection of a penalty of a dollar each for reprints from them.

"As previously stated, they are neither 'pictorial illustrations' nor 'works connected with the fine arts' within the meaning of Section 4952. Not being so, there was no authority to grant the copyrights, whether the constitution authorizes Congress to promote the fine arts or not.

"The judgment of the court is, that the plaintiffs, on their own showing, are not entitled to recover, and for that reason the motion of defendant will be granted, and I will instruct the jury to find a verdict for it."

The jury, in accordance with said instruction, returned a verdict for the defendant. (Page 66.)

The plaintiffs sued out their writ of error in the Circuit Court of Appeals, and after argument an opinion was handed down sustaining the decision of the Circuit Court. (Pages 72 to 77.)

There is no question as to the fact of infringement.

The sheets in evidence, made by defendant, contain reproductions by means of cheap electrotype plates of each of the plaintiffs' designs. These reproductions are not in colors.

The Copyright Law.

We have not printed the sections of the copyright law in this brief because the important sections, R. S. 4952, 4956 and 4965, are printed in the record in the opinion of Judge Evans, on pages 60, 62 and 63. We shall hand to the court copies of an official pamphlet issued by the Librarian of Congress, which contains the whole copyright law in convenient form.

But it should be noted that in quoting Sec. 4956, on page 62 of the record, either the court or the printer has omitted an important clause. In the middle of the section, line 9 from the end of page 62, as printed, after the words "District of Columbia," and before the words "two copies of such copyright book" etc., there should be inserted the clause, "*or deposit in the mail, within the United States, addressed to the Librarian of Congress, at Washington, District of Columbia.*"

This makes the copyright date from the mailing of the copies as it does from the mailing of the printed title; and not from their receipt by the Librarian at Washington.

We quote the first part of this section, correctly, as follows, the passage omitted in printing the record, being italicized:

> "Sec. 4956. No person shall be entitled to a copyright unless he shall, on or before the day of publication, in this or any foreign country, deliver at the office of the Librarian of Congress, or deposit in the mail within the United States, addressed to the Librarian of Congress, at Washington, District of Columbia, a printed copy of the title of the book, map, chart, dramatic or musical composition, engraving, cut, print, photograph, or chromo, or a description of the painting, drawing, statue, statuary, or a model or design, for a work of the fine arts, for which he desires a copyright, nor unless he shall also, not later than the day of the publication thereof, in this or any foreign country, deliver at the office of the Librarian of Congress, at Washington, District of Columbia, *or deposit in the mail, within the United States, addressed to the Librarian of Congress, at Washington, District of Columbia,* two copies of such copyright book, map, chart, dramatic or musical composition, engraving, chromo, cut, print, or photograph, or in case of a painting, drawing, statue, statuary, model, or design for a work of the fine arts, a photograph of same."

THE PRINCIPAL QUESTIONS

to be decided by this Honorable Court will be as follows:

First—Whether on the question of artistic merit or value of these lithographic prints or chromos, the Circuit Court was justified in taking the case from the jury, and condemning them entirely as not being fit subjects for copyright.

Second—Whether the copyrights were obtained for these prints in accordance with the constitution and laws of the United States, and are valid copyrights.

The second question involves the inquiries:

(*A*)—Whether the copyrights were properly taken out by the plaintiffs, in their trade names of "*The Courier Co.*" and "*The Courier Lithographing Co.*", and, incidentally, whether plaintiffs have the right to sue in their individual names for infringement of these copyrights; and

(*B*)—Whether the Statuary Act Design was copyrighted before it was published.

If this court should hold that the courts below erred in regarding the three lithographic prints or chromos, the subject matter in suit, as not proper subjects of copyright, or that the trial court erred in taking the case from the jury, the result will be a new trial, at which the opinion of this court will serve as a guide upon these various questions.

THE ASSIGNMENTS OF ERRORS,

Record, pages 79 and 80, are substantially as follows:

I. The Trial Court erred in rejecting evidence offered by the plaintiffs showing, among other things, that two copies of the Statuary Act Design were received at the Librarian's Office on April 11, 1898.

Under sub-heads 2, 3, and 4, this first assignment also points to the refusal of the Circuit Court to receive evidence as to the custom of the trade regarding the relations between the printer and the customer, the refusal of the court to receive evidence that would demonstrate that defendant's copies were line for line reproductions of the copyrighted pictures, and the refusal of the court to permit the relations between the artist and the plaintiffs' company to be demonstrated more clearly.

II. The Trial Court erred in sustaining defendant's motion to charge the jury to find for the defendant, and in so charging the jury.

III. The Trial Court erred in overruling plaintiffs' motion for a new trial.

IV. The Circuit Court of Appeals erred in not reversing the judgment of the Trial Court.

V. The Trial Court and Circuit Court of Appeals erred in holding that the Statuary Act Design was not a proper subject of copyright.

VI. The Trial Court and Circuit Court of Appeals erred in holding that the Stirk Family Design was not a proper subject of copyright.

VII. The Trial Court and Circuit Court of Appeals erred in holding that the Spectacular Ballet Design was not a proper subject of copyright.

ARGUMENT.

GENERAL FEATURES OF THE CASE.

The three pictures in question are show-bills or circus bills, also called posters and, more definitely, *picture-posters*. They are colored lithographs or chromo-lithographs, commonly called "chromos." They were designed primarily to be sold to the proprietors of circuses and other shows, and by them to be used for advertising; but they could be sold to any one, or used for any purpose for which they were adapted.

They were made in the plaintiff's lithographing establishment under a special contract with Mr. Wallace, proprietor of the Wallace Circus, by which the plaintiffs agreed to design and get up certain representations of scenes supposed to be exhibited at the Wallace show, the plaintiffs reserving rights of design and of copyright, and with the usual understanding that so long as Wallace used these designs he had the right to them, but if he ceased to use any of them the plaintiffs could sell the design or the pictures which embodied it, to any one. Wallace or his agent simply told the plaintiffs that they were to have a grand ballet, some statuary acts representing certain scenes, and some trick bicycle riding, giving more or less details, and from this information the plaintiffs were required to and did get up these designs and create the pictures. (The evidence on these points will be referred to and quoted later.)

The resulting show-bills or posters are good specimens of that class of work, much above the average of the show-bills produced in the numerous and extensive lithographing establishments of the country. They were printed in various sizes, some very large, to be posted on bill-boards, and others of moderate size, like the exhibits which will be shown to the court, intended to be hung in windows and called "window work."

The "*Spectacular Ballet*" represents the chorus of a large ballet as customarily represented in grand opera, but somewhat idealized, with three principal performers in the center—a brilliant and striking group of figures in the conventional Italian ballet dress. The "*Statuary Act*" design exhibits a number of tableaux of historic and mythical events—"Landing of Columbus", "Apollo and Muses", "Triumph of Love", "Rock of Ages", and "Offering to Cupid." All of these are graceful and pleasing conceptions, skillfully grouped and colored with great taste. The "*Stirk Family*" picture represents a family of expert bicycle riders, engaged in fancy riding. This subject did not admit of such artistic treatment as the others, but, considering the subject, the artist has certainly produced a very attractive and distinctly original poster.

Reduced copies of these pictures will be handed to the court with this brief.

It will be seen that the fundamental question of the right to copyright such show-bills or posters, is a question of great importance, involving the protection of an immense industry.

If the proprietors of the lithographic establishments of the country cannot copyright and protect their designs for posters and show-bills, but these can be pirated and copied by cheaper competitors, then the entire lithographic business will have to be reconstructed, much capital which is now invested will be destroyed, the inducement to get up original and artistic designs will be at an end, and this great business, which has been steadily improving in the artistic quality of its productions, will surely deteriorate, and will have to be run on what may be described as a cheap and nasty basis.

The foundation of the copyright law is in the provision of the constitution (art. 1, sec. 8), which authorizes Congress—

> "To promote the progress of science and *useful arts*, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."

It is settled that the words "authors" and "writings", in this section, are not confined to literary writers and their works, but include, among others, *designers, engravers and lithographers*, as well as photographers.

> *Burrow-Giles Litho. Co. v. Sarony*, 111 *U. S.* 53.
> *Trade Mark Cases*, 100 *U. S.* 82.

We may anticipate our argument by pointing out that engraving, and especially engraving on stones or lithography, is surely a "*useful art*", and that its protection and promotion by means of copyrights has been one of the main objects aimed at by Congress in all of the copyright legislation, beginning with the first act, of May 31, 1790.

It is also proper, at this point, to call attention to the well-known *purposes and the necessary limitations of picture-posters* or show bills, such as these chromo-lithographs were. They are not designed for close inspection or long-continued study, like an oil painting, a steel or wood engraving, or an etching, and they are not to be judged by the same standards. They are intended to catch the eye of the passer on the street, or anyone who merely glances at them, and to challenge his attention,—if possible to compel him to look again, so that he will observe what is the subject of the poster and have this forced upon his mind, and will be attracted by it. Their function is to illustrate something, and to advertise it by appealing quickly to the imagination, and conveying instantly a strong and favorable impression. Thus, to be successful, they require artistic ability, and above all things creativeness or originality of a high order, but peculiar. They must be designed boldly, and executed on

broad lines, with not much attention to detail, so that the spirit of the picture will stand out at once, and almost leap at you, and will not be lost in a mass of details and minor features.

Such, as we understand, is the ideal picture-poster, a special and peculiar branch of pictorial art, and one into which many gifted artists, highly successful in other fields, have ventured with greater or less success.

An excellent view of the scope and purposes of the picture-poster is given in the work of Charles Hiatt, entitled "*Picture Posters*", published in 1895 by George Bell & Sons, London; also in "*The Modern Poster*", by Alexandre and others, published in 1895 by Charles Scribner's Sons. Indeed there is quite a body of valuable and interesting poster literature which has grown up within recent years, and poster exhibitions are frequently held in all large cities.

In *Appendix A (end of brief)* we quote some paragraphs from the opening chapters of Mr. Hiatt's book, and mention a few of the celebrated artists who have produced posters, for use as artistic advertisements. We also refer to the reproductions of certain posters which appear in the Scribners' book, on pages 80, 81, 83, 88, 90.

Another feature should be mentioned in this connection. The picture-poster or show-bill cannot be an expensive or elaborately worked out chromo-lithograph, such as those which closely imitate the fineness of oil paintings and are produced by using from ten to twenty different stones, each printing a color on different parts of the same sheet. Such elaborate chromos are barred on account of the great expense, and moreover they would not produce the quick and startling effect, the instant impression on a mere passer-by, which a poster aims at. The posters in ordinary use are made by using three or four, or, at the most, five stones, on which the colors are spread broadly. The pictures in question in this case are what are called four-

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color work, and it is quite wonderful what a variety of soft tints and shades can be produced by the use of these four colors put on the stones so that they will be superimposed on one another in the printing.

Such pictures are necessarily cheap; they are sold in large quantities to be scattered broadcast, and only do service for a few days at the most. But the fact that they are thus cheaply printed, and on common paper, does not make it any less possible or less necessary to have real artistic merit in the design; on the contrary, it is the more needful to have an original and meritorious and striking design. The same design, if worked out with the detail of a ten-color chromo and printed on good paper, would produce a much finer result upon a critical examination.

As already stated, the purpose of such posters is to attract the public, to please them, and to make them want to see or to possess the thing depicted or illustrated. They appeal to the tastes and imagination of people as they are; but they can be made to serve a useful purpose by gradually educating and refining the public taste, or they can serve to degrade and pervert it. The former tendency will be promoted by protecting such advertising pictures through the copyright law; the latter by throwing down the safeguards of copyright, and allowing piracy of original and expensive designs.

But under such circumstances it is clear that the value of such posters is in their attracting or drawing power. If they illustrate and advertise a show, their value is proved practically by the number of people they bring to that show. So in the case of such posters, the test of the "box-office receipts", spoken of in some of the copyright decisions, becomes an absolute test of the practical success and value of the picture. And if such pictures, after being used for a season, are stolen and copied by others to be used in like manner, this strongly tends to prove their value for the purposes for which they were designed.

Certainly it does not lie in the mouth of the pirate, who has stolen and copied them at some expense and considerable risk, to deny that they have merit and value.

This general statement of facts and features of the case, which we believe will not and can not be disputed, prepares the way for the following points.

POINT I.

THE DESIGNS WERE PROPER SUBJECTS OF COPYRIGHT.

We respectfully but earnestly contend that each of these picture-posters was a proper subject of copyright, within the language and the spirit of the copyright law. There was abundant evidence of originality of design, of artistic merit, and of practical value and usefulness, as to each of the pictures.

If any of these qualities was seriously questioned by the defense, it became the duty of the court to send the case to the jury.

As a matter of fact, no one of these qualities was questioned by the defense in any way. They were not questioned by the answer, but as that was a general denial it would probably cover any such point without indicating it; but no such question was raised by the offer of any proof, nor even by the motion for a nonsuit or "peremptory instructions," as it was called.

The court injected this question into the case at an early stage, as has been mentioned, by its remark: "The real controversy will be whether this is a subject of copyright, whether it comes within the copyright law" (page 28); but this lead was

never taken up or followed by defendant's counsel. When he moved for peremptory instructions, and was asked to state his reasons, he first objected specially to the Statuary Act on the ground that, as he claimed (erroneously), it had been published before it was copyrighted, and next specifically to the Ballet as being "an immoral picture"; and then said (page 59):

> "And the general objection that I make to them all is that they are none of them subject matter of copyright. *They are all mere matter of advertising.*"

This objection did not even suggest any lack of originality, or creative design, or artistic value in the pictures, but only raised the point, which is quite untenable, that pictures designed to be sold for advertising purposes cannot be copyrighted.

So it is literally true that the Trial Court granted a nonsuit and instructions against the plaintiffs on grounds which were not raised by the defense, and were not used by the defense even after the court had suggested them.

The Trial Judge in his written opinion granting the nonsuit, as shown by his conclusions already quoted, did not adopt the contention of the defendant that these pictures were not proper subjects of copyright because they were designed to be sold for advertising circuses and other shows; but *he assumed to condemn all of them as being such poor pictures that they were not copyrightable.* He said (page 66):

> "The court cannot bring its mind to yield to the conclusion that such tawdry pictures as these were ever meant to be given the enormous protection of not only exclusive right to print them, but * * * a penalty of a dollar each for reprints from them. As previously stated, they are neither 'pictorial illustrations' nor 'works connected with the fine arts' within the meaning of Section 4952. Not being so, there was no authority to grant the copyrights, whether the constitution authorizes Congress to promote the fine arts or not."

But the Trial Judge did not question the fact that these pictures were original designs, created by the plaintiffs or their employees. On the contrary, he said (page 61):

> "Each of the engravings *was designed* and engraved at Buffalo, N. Y., and at least one of them by an employee of the plaintiffs, the Courier Company, and all were designed for use as show-bills, and as advertisements for the Wallace Circus."

In truth, the original designing of these pictures had been clearly proved in sweeping terms by the plaintiffs' first witness, Mr. Bleistein, in answer to a rather trying series of questions first put to him by the Trial Judge himself. (Pages 33, 34, 35, 38.) Mr. Bleistein testified:

> "In our contract with Mr. Wallace, and with all the shows, we simply agree to furnish a stated amount of paper, whether it is old or new, for a certain amount of money per sheet. We reserve rights of design, that we put in our copyright. We copyright that with the simple view that as long as Mr. Wallace uses that, he has the right to use it; but if he ceases to use that bill—say he does not do the Statuary Act next year—we have the right with that design to sell to other people who may want to use that sort of thing". (Page 34.)

He further stated that these pictures were "designed by the Courier Company, by our man * * * a man named August Bandlow" (page 33); that the plaintiffs became proprietors of the design "*by having it made by one of our men, his original own idea * * * he designed that.* We engage his talents. We pay for his talents" (page 34). And again, as to another of the pictures: "*He was the author and designer of that. We engage his talents, and what he produces belongs to us.* * * * *Q. Who designed those three? A. Mr. Bandlow*". (Page 35.)

> "The Court: Let him state what the agreement was?
>
> "The Witness: My agreement with Mr. Bandlow is that he was to receive while in our employ $100 a week as designer. He was to furnish us with such designs as we needed, and they were to be our property; for consideration of that he was to receive $100 per week". (Page 36.)

Incidentally, this shows that Mr. Bandlow was regarded as an artist of ability and whose work was of value. He was paid over $5,000 a year.

In regard to the purposes of the pictures and the sources from which the plaintiffs got their instructions as to making them, Mr. Bleistein on cross-examination testified as follows (end of page 37):

"By Mr. Kittredge (cross-examination):

"Q. Who informed you, or furnished information to you concerning that, that was what they intended to exhibit to the public, that they intended to present a ballet of that kind?

"A. Mr. Wallace simply wanted us to get up a—

"Q. Now, answer my question. Who informed you?

"A. I am trying to do that.

"Q. Answer my question. It is a simple question; who informed you that that was—that they intended to present a ballet of that character?

"A. Mr. Wallace or his agent informed us that they were going to present a ballet. Whether it was just of that character or not, I don't know.

"Q. Who informed you that they were going to present the scene of the bicycle performance?

"A. Mr. Wallace or his agent, I dare say.

"Q. Who informed you that they intended to present these statuary pictures as a performance in their circus?

"A. Mr. Wallace, or his agent, I dare say; *not that they were to have these very same things. They were left to us to design.*

"By Mr. Helm (redirect examination):

"Q. I want to ask you this, Mr. Bleistein—were these engravings or these drawings made from descriptions given you by Mr. Wallace's show, or any employee of that show, or were they the creation of your employees?

"A. They were the creation of our employees, principally.

"Q. Take the ballet matter; was that principally, or was it not entirely, your creation?

"A. Entirely". (Page 38.)

In view of this evidence, which had just been given, and was not only undisputed but even unquestioned by the defense, the

Trial Judge could not and did not question the original designing or creation of any of the pictures involved in this case; but he assumed authority, which we think was unwarranted, to pass on the facts at that preliminary stage and take them away from the jury, and undertook to condemn all the pictures as being utterly without merit, and so uncopyrightable. There is some confusion in his decision growing out of the discussion of minor points—none of them actually important; and owing to the doubt, which was evidently working in his mind, whether Congress was really authorized by the constitution to pass a copyright law protecting works of the *fine arts* as such, and his attempt to distinguish the fine arts from the "*useful arts*," referred to in the constitution; and particularly owing to his attempt to construe Sec. 3 of the Act of June 18, 1874.

But at the close of the opinion he substantially brushed aside every other question and came down to the proposition with which he had plainly started off—that the copyright law was not intended to and did not protect ordinary posters like those before him, which he stigmatized as "cheap show-bills" and "tawdry pictures", even though they were based upon really original designs.

It appears clearly that the Trial Judge was alarmed and repelled by the "enormous penalties" provided for by the statute, which he mentions twice in his opinion (page 64, first paragraph, and page 66, as above quoted); and that he practically reached his decision by attempting to measure up this penalty of one dollar for each sheet seized against the comparatively small value of the individual sheets as produced by the infringing defendant, or even by the plaintiffs. In so doing he disregarded the principle involved, which would have been the same whether the marshal had seized one sheet or ten thousand; he forgot the right of the plaintiffs to have the copyrights for their original designs sustained under the statute, even if this cost the defendant smartly, and even

though the pictures made from their designs were in a certain sense cheap show-bills, and he ignored the fact that one-half of the penalties go to the United States Government, and not to the plaintiffs; and, finally, he forgot that he was not the Congress, exercising its constitutional power to legislate for the protection of authors and inventors, including artists, by copyrights—as he also forgot that he was not the jury authorized by the constitution to pass upon the facts. So forgetting, the Circuit Judge assumed the powers of Congress to remake the copyright law, as well as the powers of the jury to decide the facts. *Note* *.

Note—As to the Statutory Penalties.*

We are not called upon to defend the policy of Congress in fixing the penalties for infringements of copyrights.

Perhaps in view of the cheapening of photographs and lithographs and other similar prints, it may be proper for Congress to undertake another revision of these penalties; but this is not a question with which either counsel or the court has anything to do.

It is proper, however, to call attention to the fact that this precise subject has been before Congress recently, and in the year 1895 it revised Sec. 4965, prescribing the penalty for infringements of copyright. The penalty had previously been one dollar for every sheet found in the possession of the infringer, without limit. By the act of March 2, 1895, chap. 194 (28 Stat. at Large, page 965), Congress added the *proviso* that for infringement of the copyright of an ordinary photograph, the sum to be recovered in any action should be not less than $100, nor more than $5,000, and "in case of any such infringement of the copyright of a painting, drawing, statue, *engraving*, etching, *print*, or model or design for a work of the fine arts, or a photograph of a work of the fine arts, the sum to be recovered in any action brought through the provisions of this section shall be not less than $250, and not more than $10,000,"—one-half of the penalties to go to the proprietors of the copyright and the other half to the use of the United States.

By this amendment Congress evidently intended to place a reasonable minimum and maximum amount upon the penalties in all cases.

The Circuit Court of Appeals, in its opinion affirming the judgment, seemed to question both the originality of design and the artistic merit of these pictures. In the opinion written by Judge Lurton, the fact is stated:

> "Plaintiffs' evidence also tended to show that the 'design' or 'conception' was that of an employee working under a salary for them, and that his 'designs' were the property of the employer, and therefore copyrighted by them". (Page 73.)

Later he states the facts, quite erroneously, as we think, as follows:

> "There was no evidence touching the originality of any of these designs other than the general statement of one of the plaintiffs that Mr. Wallace represented that these acts were to be done in his show, and that the designs as copyrighted were 'the creations of our employees' ". (Page 74.)

Coming to the discussion of the facts as previously stated in his opinion, Judge Lurton begins as follows:

> "The copyrighted chromos or prints were designed to be pictorial representations of acts done in the Wallace Circus. That they were designed and intended for advertising purposes only is undisputable. They may be 'creations' in the sense that they are not exact reproductions of the acts they advertise. *But that the arrangement, pose, color, grouping or expression is new or original does not appear in the evidence, nor can we assume it from an examination of the prints themselves.* Aside from this function as advertisements, we are unable to discover that they have any use whatever, or that they have any intrinsic merit or value.
>
> "But they are 'chromos' or 'prints', and chromos and prints are included in the list of productions which, under the statute, may be copyrighted. But are all chromos and prints unqualifiedly entitled to the protection of the copyright law? Must such a construction be given the statute?" (Page 74.)

After citations from a few of the authorities the opinion declines to hold in favor of the contention of the defense, that

these pictures were barred from copyright because they were intended to be sold and used for advertising purposes. It states:

> "The exigencies of the case in hand do not require that we should express any opinion upon the broad subject.
>
> "It may be that a picture, or lithograph, or engraving, though intended to be reproduced in prints and used as an advertisement, is entitled to the protection of the copyright law, notwithstanding the use for which it is designed". (Page 76.)

Finally, the opinion of the Circuit Court of Appeals concludes:

> "*What we hold is this*, that if a chromo, lithograph or other print, engraving or picture, has no other use than that of a mere advertisement, and no value aside from this function, it would not be promotive of the 'useful arts', within the meaning of the constitutional provision to protect the 'author' in the exclusive use thereof, and the copyright statute should not be construed as including such a publication, if any other construction is admissible.
>
> "If a *mere label*, simply designating or describing an article to which it is attached, and which has no value separated from the article, does not come within the constitutional clause upon the subject of copyright,*

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*Note**—This is, of course, an inadequate statement of *the law in relation to labels.*

While it is true that a mere label, which simply designates or describes the article to which it is attached, and has no value separated from the article, such as a mere name or descriptive title, is not copyrightable, because it involves no invention, no authorship; yet labels which are original designs and do involve authorship, are entitled to protection, and may be copyrighted by the express terms of the statute. (Act of June 18, 1874.) But the statute, for convenience, says that this must be done by registering them in the Patent Office, not by depositing the title and filing copies in the Office of the Librarian of Congress, as in other copyrights.

This is shown by the very case cited by the Circuit Court of Appeals. (*Higgins vs. Keuffel*, 30 *Fed. Rep.* 627; 140 *U. S.* 428 See also, *Marsh vs. Warren, Fed. Cases, No.* 9121.)

it must follow that a pictorial illustration designed and useful only as an advertisement, and having no intrinsic value other than its function as an advertisement, must be equally without the obvious meaning of the constitution. It must have some connection with the fine arts to give it intrinsic value, and that it shall have is the meaning which we attach to the act of June 18, 1874, amending the provisions of the copyright law.

"We are unable to discover anything useful or meritorious in the design copyrighted by the plaintiffs in error other than as an advertisement of acts to be done or exhibited to the public in Wallace's show. No evidence aside from the deductions which are to be drawn from the prints themselves was offered to show that these designs had any original artistic qualities. The jury could not reasonably have found merit or value aside from the purely business object of advertising a show, and the instruction to find for the defendant was not error". (Pages 76, 77.)

These quotations present, clearly and fully, the bases of the decisions of the courts below.

Further argument on the merits naturally divides itself into two inquiries:

(*First*)—Are these pictures, or any of them, new and original designs, involving new and original conceptions and creations; and was there sufficient evidence on this question to require the case to be submitted to the jury?

(*Second*)—Assuming that they are new and original, are the pictures, or any of them, of sufficient artistic merit or of sufficient use or value for any legitimate purpose, to be entitled to copyright within the decisions construing the copyright law; and was there sufficient evidence on this question to require the case to be submitted to the jury, or was the court justified in granting a nonsuit and deciding it adversely to the plaintiffs?

(**FIRST**)—*As to Originality of Design.*

We maintain that these pictures, and all of them, are new and original designs; that they involve new and original conceptions and creations.

Certainly there was enough evidence on th subject to require the case to be submitted to the jury if any question was raised about it,—though we think, as already stated, that no such question was raised.

The Circuit Court of Appeals, after stating the question in regard to the copyright law as above quoted from page 74 of its opinion, proceeds to quote the *Trade-mark Cases*, 100 *U. S.* 82, where the Supreme Court, speaking through Mr. Justice Miller, held that:

> "While the word 'writings' may be liberally construed, as it has been, to include original designs, for engravings, prints, etc., it is only such as are *original* and are founded in the creative powers of the mind. The writings which are to be protected are the *fruits of intellectual labor* embodied in the form of books, prints, engravings, and the like."

So in the case of *Lithograph Co. vs. Sarony*, 111 *U. S.* 53, the Supreme Court mentioned with approval the claim that:

> "An engraving, a painting, a print, does embody the intellectual conception of its author, in which there is novelty, invention, originality, and therefore comes within the purpose of the constitution in securing its exclusive use or sale to its author."

And the court substantially adopted the definition of *author* by Lord Justice Cotton, in *Nottage vs. Jackson*, 11 *Q. B. Div.* 627, where he said:

> "In my opinion 'author' involves originating, making, producing, as the inventor or master mind, the thing which is to be protected, whether it be a drawing or a painting or a photograph."

This court, in the *Sarony Case*, further referred to the special necessity of making proof of the facts of originality and intellectual production, in a suit for violation of copyright.

As to *what degree of originality*, invention or creation, is required to be shown, the *Sarony Case* is an important authority. This was a suit for infringement of copyright in a photographic picture of one Oscar Wilde, and the court said:

> "The third finding says that it is a useful, new, harmonious, characteristic and graceful picture, and that plaintiff made the same * * * entirely from his own original mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement or representation made entirely by plaintiff, he produced the picture in suit.
>
> "These findings we think show this photograph to be an original work of art, the product of plaintiff's intellectual invention, of which plaintiff is the author."

This decision has been followed in many subsequent cases and has laid the foundation for the protection of many photographs for which valid copyrights have been obtained.

As shown by the *Sarony Case*, the degree of originality required to entitle a literary or artistic production to the protection of copyright, is not great. Upon similar lines of reasoning the cases uniformly hold that an article to be capable of copyright must exhibit in some degree "the fruits of intellectual labor, embodied in the form of books, prints, engravings, and the like." But until the decision of the case now at bar, we believe that the courts have uniformly disclaimed the right to act as literary or artistic critics, in passing upon the degree of originality or of merit which is shown.

The former decisions go no further than to hold that the article produced must be of such a character as to admit of intellectual or artistic treatment, and must be sufficiently complete to be useful and valuable in itself. If this appears, and if some one proves that he produced it, then he is entitled to a copyright.

In *Brightly vs. Littleton*, 37 *Fed. Rep.* 103, the court said:

> "The matter must be original and possess some possible utility. The originality, however, may be of the lowest order, and the utility barely perceptible."

In *Carlisle vs. Colusa County*, 57 *Fed. Rep.* 979, the court said:

> "The degree of merit of the copyrighted matter the law is not concerned with. Any is legally enough. To use it or not use it, is voluntary on the part of the public."

In *Drury vs. Ewing, Fed. Cases, No.* 4095, the court said:

> "It is clearly no objection to the validity of her copyright, that her production does not claim a standing as a work of great literary merit. The statute does not make this a necessary element of a legal copyright, and it is well known that there are works of great practical utility, having no pretensions to literary merit, which are yet within not only the words, but the scope and design of the statute."

How can it be claimed that there is in this case any lack of proof of originality or novelty in these designs for lithographic engravings, within the rules laid down by these cases? We should say that it was not possible, except for the fact that the decision has been against us, and, to some extent, in the Court of Appeals at least, upon this ground.

We have already quoted (pages 14, 15) the evidence of Mr. Bleistein on this subject, and have also quoted from the opinion of the Circuit Court of Appeals, from which it can be seen how that court understated the evidence (page 18). Mr. Bleistein did say, as Judge Lurton's opinion states, that these designs were "the creations of our employees," and this alone

should be sufficient; but he said more than this. He also said, as to one of the designs, that it was "*made by one of our men, his original own idea;*" that Mr. Wallace or his agents only gave them a general suggestion of the pictures and "*they were left to us to design;*" that the Ballet picture, particularly, was "*entirely our creation,*" and more to the same effect.

Under these proofs it would seem that there was at least sufficient evidence of originality to take this question to the jury. The grouping, the posing, the costumes and draperies were all designed by the plaintiffs, or by their artist. He had not seen the ballet; he was merely told to produce his conception of a ballet and did so. He had not seen the statuary acts; he was told to produce in the form of an engraving his conception of the Landing of Columbus, of Apollo and the Muses, of the Rock of Ages, of the Triumph of Love, etc. And so with regard to the bicycle display, the Stirk Family Design—he was given and was obliged to exercise the free right to arrange, group, pose, color, and give expression.

The act of the photographer, who merely places his subject in front of the camera, and, as this court held in the *Sarony Case*, exercises his "original mental conception" by arranging or selecting the costume, disposing the light and shade, suggesting and evoking the desired expression, requires far less artistic originality, than does that of the artist who designs the expressions, groupings, costumes, coloring, shading and general harmony of the copyrighted pictures here in question.

We therefore maintain that the courts below erred in so far as they denied or questioned originality and novelty in the copyrighted pictures. This was shown affirmatively by the evidence, and the court was not asked to assume it or left in any doubt about it.

Of course if any one of the pictures was sufficiently proved to be new and original, this was enough to carry the case to the jury upon this question; but we claim that they were all proved to be new and original.

(**SECOND**)—*As to Artistic Merit and Value.*

The pictures being original designs, we maintain that they are of sufficient artistic merit and of sufficient value and usefulness to be entitled to copyright.

At least there was enough evidence of this to require the case to be submitted to the jury, if any question was raised about it,—and again we say that no such question was raised by the defense.

The view which the Circuit Court and the Circuit Court of Appeals took of this question is shown by the quotations from their opinions already made: and the previous statements and discussion in this brief have anticipated some of our arguments on this point, and our reasons for believing that both of these learned courts fell into palpable error.

The Circuit Court called the pictures "cheap show-bills" (page 64), and again "tawdry pictures" (page 66), whose value was disproportionate to the large penalties for infringement prescribed by the copyright law. We have stated that the pictures were intended for use as show-bills or posters, and that the copies produced in evidence were cheaply printed and on common paper, as show-bills and posters usually are. So in this sense it may be correct to call them "cheap show-bills"; but the design was not a cheap one, as is shown by the evidence that the artist who made it was paid at the rate of $100. per week. Whether or not they were "tawdry pictures" may fairly be said to be a matter of taste. To a New England Puritan of the seventeenth century, they probably would be that or worse; to an art critic who can see nothing good in any production of art except what is classical or modern pre-Raphaelite, the phrase "tawdry pictures" would probably be too mild a condemnation of these or any other posters or show-bills. If

our courts in construing the copyright law are to adopt the standards of New England Puritanism of two hundred years ago or of hypercritical art censors, there will be few works found of sufficient artistic merit to deserve the protection of copyright. But this is absurd, and need not be discussed seriously.

The Circuit Court of Appeals did not indulge in epithets, like the Trial Court, but it said of these pictures:

> "Aside from this function as advertisements, we are unable to discover that they have any use whatever, or that they have any intrinsic merit or value". (Page 74.)

We are unable to imagine what standard the learned judges of the Circuit Court of Appeals thought should be applied to posters and show-bills, in adopting this statement as their conclusion upon a serious question of law, involving important principles and large industrial interests.

The fact that the pictures were original designs has been clearly shown, although the Circuit Court of Appeals seemed in some doubt about this; that they were designed by an artist of standing, and whose services commanded a high salary, was shown; that they were brilliant and striking representations of the scenes they were intended to depict, such as would surely attract the eye and command the attention of the public, in spite of the cheap materials with which they were reproduced, was obvious from a mere inspection of the pictures themselves,—and this, as we have pointed out, requires artistic ability of no mean order; that they were valuable and useful for the purpose of illustrating and advertising these scenes is conceded by the court itself in the statement just quoted, and was fully demonstrated by the fact that Mr. Wallace desired them reproduced the next year, and that they were stolen and copied by the defendant, although he knew that they were copyrighted, and although he did not question the validity of the copyrights.

If these facts do not show artistic merit and value, as well as practical utility, we are at a loss to know what the court would expect. Certainly if these facts do not show these qualities in a sufficient degree to sustain copyrights, it follows that no posters or show-bills or ordinary chromo-lithographs can be copyrighted. The very fact which is stated by the court, that they had value as illustrations and advertisements of scenes in Wallace's Circus, shows that they possessed strength and artistic merit. They would not be of much use as advertisements of a show unless they pleased and attracted the public, and it takes artistic work and real merit to do this.

If such facts as these are not sufficient to show artistic merit and value,—if they do not make at least *prima facie* proof requiring the denial of a nonsuit, then we beg this court to instruct us and the profession at large what kind of proof is required in these cases. When the Circuit Court of Appeals commented upon the supposed absence of affirmative evidence of artistic merit, did it have in mind that *the plaintiffs might have called experts* to prove, by opinion testimony, that the pictures were artistic designs and had value?

Such expert testimony is the only distinct kind of evidence which could have been supplied and was omitted. If the Trial Court had wanted it and called attention to its absence, it could have been supplied instantly, because both Mr. Bleistein and Mr. Rudolf, who were present as witnesses, are men of large experience and critical judgment in such matters, although not themselves artists.

But we do not believe that either of the courts below intended to hold, or that this court will hold, that expert testimony is essential to prove the artistic qualities of ordinary pictures such as these. It may be admissible, and it may in some cases be desirable; but it cannot be so essential that without it the plaintiffs' case will necessarily fail even to reach the jury. It occurs to us that formal expert testimony to the effect that

such prints are or are not artistic and meritorious designs would be almost ridiculous and is quite unnecessary. A jury composed of intelligent men, having the pictures before them, and the facts connected with their designing, their successful use, and the desire for their reproduction which resulted in the piracy, must be quite capable of passing on the facts without the aid of professed experts.

More than this, we assert that the pictures themselves furnish sufficient evidence—indeed that they are the *best evidence* —that they are of such a character as to admit of intellectual and artistic treatment. If so, and if proved, as they were, to be original works, they would be entitled to copyright as matter of law.

It must always be remembered that the Trial Court did not give the jury a chance to pass on this question, but disposed of it by a nonsuit. The defendant had not raised any such question,—certainly not by the motion for a nonsuit or peremptory instructions, as we have pointed out.

Moreover when the marshal, with Mr. Rudolf, one of the plaintiffs, went to seize the prints in defendant's possession, it appears by Mr. Rudolf's testimony that Mr. Donaldson, president of the defendant company, did not claim any right to copy the plaintiffs' designs, but the contrary. Mr. Rudolf testified (pages 44 and 45):

> "Mr. Donaldson showed me one of his Ballet designs, and asked me whether I considered it an infringement of my design. I told him I was not answering those kinds of questions; and he further told me that *he knew that we had a copyrighted design of the Ballet bill*, that we had made for Wallace, and which he gave to his artists *so that they would not copy our designs.*"

The marshal, Mr. Compton, testified that he could not remember whether Mr. Donaldson, on the same occasion, said anything to him as to his knowledge of these designs being copy-

righted, but he added: *"I believe he said to me, though, that they were not infringements."* (Page 47).

These remarks show that the defendant had no idea of questioning the copyrightable qualities of plaintiffs' pictures. They simply took their chances, recklessly, in appropriating designs, as they and many others had done before.

In fact the defendant company could not question the merit or value of plaintiffs' pictures, after it had taken the trouble and risk of appropriating and copying them.

The fact that it did this, to supply Mr. Wallace's order for some more advertising matter, is regarded as good and sufficient evidence that, in the eyes of both producers and purchasers of circus posters, these prints are meritorious and valuable.

> *"If it (a copyrighted article) has merit and value enough to be the object of piracy, it should also be of sufficient importance to be entitled to protection."*
>
> *Drone on Copyright, page* 212, cited with approval in *Henderson vs. Tompkins*, 60 *Fed. Rep.* 758, *at page* 765.
>
> See also, *Church vs. Linton*, 25 *Ont. Rep.* 121.

There was at least a question of fact for the jury.

It was the Trial Court, as we have already shown, which invented the question whether the plaintiffs' designs were properly copyrightable, and then decided that question out of hand by granting the nonsuit. We submit that this, in any view, was wholly unjustifiable. Suppose the Trial Judge had deemed these pictures to be original works, of great artistic value, would he have been justified in taking this question from the jury and ordering a verdict for the plaintiffs; and if he had done so, would such a verdict stand? This question admits of only one answer; but it is the same answer which should be made to the question, Can the present verdict stand?

In a very similar case, involving the same class of illustrations or theatrical posters, the Circuit Court for the Southern

District of New York expressed the opinion that it was a question for the jury whether such pictures have intrinsic merit or value.

We refer to the recent case of *Hegeman vs. Springer*, reported on affirmance by the Circuit Court of Appeals, in 110 *Fed. Rep., page* 374.

On the trial of this case, Judge Lacombe submitted to the jury, in a luminous charge, the question of fact whether a theatrical poster intended to advertise the show called the "Black Crook", was a proper subject of copyright. He said:

> *"The only real question for you to pass upon is whether Exhibit D (the copyrighted poster) was a proper subject for copyright; that is, whether it was in a proper sense the production of the plaintiff,—whether it was a novelty, whether it was a creation."*

Judge Lacombe followed this statement of the question by saying:

> *"It does not mean necessarily that the plaintiff must have been the sole intellectual genius that composed and devised it. He himself, working with men whom he employed to assist him for that purpose, if he succeeds in bringing out a work of original design, of merit, more or less artistic in its character, will be entitled to a copyright.*
>
> *"It is not the single individual only, or the artist alone, who is entitled to the copyright; it is the proprietor, the owner, as well as the artist."*

The whole of Judge Lacombe's charge to the jury in *Hegeman vs. Springer*, is printed as an appendix to this brief for the convenience of the court, copied from the original record in that case. (*Appendix B.*)

In *Bolles vs. Outing Co.*, 77 *Fed. Rep.* 966, 175 *U. S.* 262, Judge Wallace, for the Circuit Court of Appeals, said:

> *"Whether a photograph is a mere manual reproduction of subject matter, or an original work of art, is a question of fact."*

If we examine the pictures in question, starting with the *Statuary Act Design*, the conception of the landing of Columbus, which to our understanding is entirely novel, is certainly very artistic. The grouping of the Indians, their facial expressions, their kindly treatment of Columbus who stands as a young hero, are positively beautiful and elevating. So Apollo in his attitude towards the Muses is a fine conception; and it is entirely cruel to deny to the man who conceived and gave us these illustrations the right to prevent others copying them, simply because the original purpose was to use these pictures on posters for advertising purposes. As we examine the attitudes and costumes and the facial expressions in the *Stirk Family Design*, we find in them considerable beauty and more than ordinary originality of expression,—a skillful treatment of a hard and difficult subject. In the *Ballet picture*, the main effect intended to be produced is that of a large harmonious group; there is nothing offensive in the picture, nothing immoral in it, unless one chooses to hold that every ballet is immoral. The grouping is of a kind to indicate and teach harmony in a mass of individuals. The facial expressions are particularly well selected; so are the arrangement of dresses, their colors and their different characteristics, not only original but beautiful to the eye and taste of most people. We cannot seriously discuss the suggestion that it is an immoral picture, because it displays the legs and arms of the ballet girls; nor do we believe that an ordinary jury would have been shocked by that fact. It seems to be a case of "*Honi soit qui mal y pense.*"

Richardson vs. Miller, *Fed. Cases*, *No.* 11,791,

a case involving a design for playing cards, contains an interesting discussion of the question of alleged immoral or indecent tendencies, as limiting the privilege of copyright, and holds

that to deprive a picture or publication of the protection of the copyright law,—

> "It must appear either that there is something immoral, pernicious or indecent in the things *per se*, or that they are incapable of any use except in connection with some illegal and immoral act."

As a mere suggestion in this connection, suppose a new Hogarth should arise and seek to copyright a set of pictures like his famous "Rake's Progress": or suppose a new picture of "Phryne before her Judges", with all the suggestiveness which that great work embodies, were now to be copyrighted, would the courts hold that such works were barred from legal protection?

Copyrights of pictures are sustained under the constitutional power of Congress to "promote the progress of *useful arts*," by the ruling that pictorial art and the other fine arts, are also useful arts, because they are educational,—because they tend to elevate the tastes of the people and their appreciation of the beautiful. If a painting on canvas which can be seen by but a few in private galleries or museums, pertains to the useful arts for this reason, then surely a picture placed where every one can see it, a poster, or "cheap show-bill," if one chooses to call it so, if artistic in design is likewise useful, and in a greater degree. It disseminates ideas of taste and beauty among the masses; it reaches every nook and corner of the nation, and exercises its influence in places which the painter can never reach.

Some minor questions, discussed in the opinion of the Circuit Court, may be passed over briefly.

(1.) We have nothing to do with cases involving attempts to copyright *mere catalogues or price lists*, sometimes containing pictures, reproduced by photographic or other mechanical processes, of articles intended for sale, but which obviously have

no artistic merit or originality. These decisions, whether condemning or upholding such copyrights, do not touch the questions involved in the case at bar. Such is the case of

Mott Iron Works vs. Clow, 82 *Fed. Rep.* 216.

(2.) Nor are we concerned to discuss further the special statutory rule in regard to *copyrighting labels*, which was introduced by the Act of June 18, 1874, section 3. This statute, as pointed out in our note on page 19 above, introduced no new principle in regard to copyrighting labels, but simply required that they should be copyrighted in a particular manner, by registering them in the Patent Office, instead of entering them with the Librarian of Congress in the form and manner of other copyrights. There is nothing of the nature of a mere label about these pictures; and there is no peculiar principle of law governing the right to copyright a design for a label, which is something more than a *mere* label.

(3.) Nor need we discuss at length the significance of those phrases, "*Pictorial illustrations or works connected with the fine arts*," in the Act of June 18, 1874, which are dwelt upon to some extent by the Circuit Judge, and referred to in the opinion of the Circuit Court of Appeals.

This Act is entitled "An Act to amend the law relating to patents, trade-marks and copyrights." The first section prescribes the form of notice to be printed on copyrighted articles. The second section relates to the fees of the Librarian of Congress. The third section is in part as follows:

> "Sec. 3. That in the construction of this Act, the words 'engraving', 'cut' and 'print' shall be applied only to pictorial illustrations or works connected with the fine arts, and no prints or labels designed to be used for any other article of manufacture shall be entered under the copyright law, but may be registered in the Patent Office.

> And the Commissioner of Patents is hereby charged with the supervision and control of the entry or registry of such prints or labels," etc.

The first sentence of this section in some publications is printed as if it were a part of section 4952 of the Revised Statutes and is so printed and referred to in the opinion of the Circuit Judge, which is an error. The law of June 18, 1874, was passed shortly before the Revised Statutes were adopted, but took effect later, on August 1, 1874. It is an independent statute.

We might well argue that the pictures involved in this case, which are chromos, are not covered by the provisions of this statute; but it is unnecessary to do so. The statute certainly does not hurt the plaintiffs' claim for copyrights on these pictures in any way. Obviously they are "pictorial illustrations" in every sense of the words; and the suggestion of the circuit judge that these words might be confined to pictures "placed in a book or other publication to elucidate the text," will not bear a moment's reflection. That they are "pictorial illustrations" or representations, somewhat idealized, of scenes to be exhibited in the Wallace Circus, is the very point of the decision of the Circuit Court of Appeals.

Equally plain is it that they are "works connected with the fine arts." They are works connected with the arts of drawing and engraving, which are fine arts. The statute does not say that they must be works embodying the highest conceptions or the best results of the fine arts, or that they must be good specimens of their particular art. It does not furnish any standard for judging these things. It simply refers to "works connected with the fine arts," and however poor specimens they might be they would come within this phrase.

The truth is that this statute does not furnish any basis or test whatever for deciding whether a picture is copyrightable, and was not intended to do so. It was intended to classify

and distinguish ordinary "prints or labels, designed to be used for any other article of manufacture," on the one hand, from other "pictorial illustrations or works connected with the fine arts" on the other hand, for the purpose of providing that one class of articles shall be copyrighted in one manner and the other class in another manner; both of them being copyrightable, so far as this law was concerned.

This statute, therefore, throws no light whatever on the questions involved in this case, and, as we respectfully submit, has only served to introduce confusion into the decisions of the lower courts.

(4.) Nor need we pay further attention to the question upon which the defense relied and apparently rested their case in making the motion for a nonsuit, whether these pictures were barred from copyright because, as the defense claimed, they were "*mere matter of advertising,*" the fact being that they were primarily designed to be sold to proprietors of circuses and shows for advertising their productions.

As we have pointed out, this contention was not adopted by the Circuit Judge, and the Circuit Court of Appeals expressly declined to adopt it. (See opinion, page 76, quoted above, page 19.)

The Circuit Court of Appeals cited as sufficient authority for declining to rule against these copyrights upon this ground the case of

Yuengling vs. Schile, 12 *Fed. Rep.* 97, 101,

which held that a chromo entitled "Gambrinus and his Followers," intended as a glorification of lager beer drinking, and designed and circulated as an advertisement of a brewer, was a proper subject of copyright, because it was "a work of the imagination, and has such obvious artistic qualities as render it fairly a subject of copyright, without regard to the use which the plaintiff has made or may intend to make of it.

"To the same effect (continued the court) is the case of *Schumaker vs. Schwencke*, 25 *Fed. Rep.* 466, and *Lamb vs. Grand Rapids School Furniture Co.*, 39 *Fed. Rep.* 474."

In *Drone on Copyright*, pages 164, 165, speaking of the copyright of a picture or publication designed for advertising purposes, the author says:

> "The question depends not on the intention of the author or the use made of the protection, but on its inherent qualities. Publications used for advertising must be governed by the same principles that apply to other works. When they lack the inherent qualities essential to copyright, they are not entitled to protection; when they have such qualities they are within the scope of the law."

See also, to same effect:

Grace vs. Newman, *Law Rep.* 19 *Eq. Cases*, 623.
Maple vs. Junior Army & Navy Stores, *Law Rep.* 21 *Ch. Div.* 369.
Church vs. Linton, 25 *Ont. Rep.* 131.

We come back to our *main proposition*, that these pictures are of sufficient artistic merit and of sufficient value and usefulness to be entitled to copyright, and that there was at least enough evidence of this to be submitted to the jury, so that it was improper to nonsuit.

As to the *degree of artistic merit and value required* for this purpose, the cases cited under the first subdivision of this point, relating to originality of design, are also authorities here. They show, as stated by the court in *Carlisle vs. Colusa County*, 57 *Fed. Rep.* 979, that:

> "*The degree of merit of the copyrighted matter the law is not concerned with. Any is legally enough. To use it or not use it, is voluntary on the part of the public.*"

In *Drone on Copyright, pp.* 211, 212, cited with approval in *Henderson vs. Tompkins*, 60 *Fed. Rep.* 758, 765, the author says:

> *"To be worthy a copyright, a thing must have some value as a composition, sufficiently material to lift it above utter insignificance and worthlessness. * * * If it has merit and value enough to be the object of piracy, it should also be of sufficient importance to be entitled to protection."*

The case of *Henderson vs. Tompkins*, 60 *Fed. Rep.* 758, decided by Judge Putnam in the Circuit Court, in Massachusetts, in 1894, is of such interest that we quote at large from the opinion.

The question of frivolity of a copyrighted song had been raised and was carefully discussed. The song was in these words:

"Hi, diddle, diddle,
The cat and fiddle,
A parrot and monkey too;
Bells they are ringing,
There's fighting and singing;
I wonder if dreams come true."

The court sustained this copyright against demurrer, and, in addition to the quotations above made from *Drone on Copyright*, said as follows:

> "It is enough to say that whether we look only at the direct results of what is addressed to the taste, the imagination, or the capacity of being amused, and the enjoyment which immediately follows therefrom, or whether we look further, and consider what is essential to keep the physical, moral, and intellectual powers refreshed, all such have been regarded by the courts, ever since patents or copyrights were authorized by statute, as within the range of utility and the useful arts. Even when the intellect is strained to accomplish its greatest results, the standard prescription from Euclid may be useful, but an occasional one from the Book of Nonsense is not to be despised.

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"The learned author of *Walker on Patents* has well said:

"'*Utility is not negatived by the fact that the manufacture covered by the patent has no function except to decorate the object to which it is designed to be attached. In such cases, utility resides in beauty. Whatever is beautiful is useful, because beauty gives pleasure, and pleasure is a kind of happiness, and happiness is the ultimate object of the use of all things.*'

* * * * * *

"If judicial tribunals could lay down maxims by which to determine judicially what dramatic compositions claimed to be humorous, or to appeal to the sense of humor, are in this particular within or without the copyright act, they would, by demonstration, be in possession of rules which would enable them to be themselves at all times witty, at their own option. The very essence of some kinds of humor is in unexpectedness and lack of proportion; and, therefore, neither courts nor juries have any certain rule for valuing it, except such as comes from evidence of the effect which the composition in question has on masses of men. The claim made by the defendant that the '*box-office value*' fails to furnish any test under the copyright laws of the United States, with reference to dramatic compositions, is not sustainable.

* * * * * *

"But a multitude of books rest safely under copyright which show only ordinary skill and diligence in their preparation. Compilations are noticeable examples of this fact. With reference to this subject, *the courts have not undertaken to assume the functions of critics, or to measure carefully the degree of originality, or literary skill or training involved.* An example of the moderate degree of literary merit sufficient to entitle a dramatic composition to protection under the statutes, is found in *Daly vs. Palmer*, 6 *Blatchf.* 256 (Fed. Cas. No. 3552) and again in *Daly vs. Webster* (decided by the Court of Appeals for the Second Circuit), 4 C. C. A. 10, 56 Fed. 483, each touching the 'railroad scene' so called. There is also the case, not officially reported, of the comic song, entitled, 'Slap, Bang,

Here We Are Again!' protected by the common pleas division, although the impression which the title gives would suggest little value, except what might be shown by sales. It appeared in this case that the copyright was worth from one thousand pounds to two thousand pounds, and at the time of the trial as many as 90,000 copies had been sold. * * *

"Under the copyright side of the statute, however, especially so far as it relates to dramatic compositions, what appeals to the sense of curiosity, or excites wonder, is especially valuable, and therefore must be protected, or the purpose of the statute would fail in a very large measure."

These authorities seem to demonstrate that the courts will not turn themselves into art critics in passing upon questions of copyright, and that these pictures possess sufficient merit, as well as originality, to be entitled to the protection of the law.

In conclusion, we repeat that to deny to artists designing pictures of this class, or to the proprietors of such pictures, the privilege of copyright, would lead surely to the result that artists would no longer be employed to produce them. Publishers cannot produce artistic designs without the assistance of highly paid artists, and they certainly would not employ highly paid artists for creations which when published would be free to any one to copy. Hence the natural development of a line of productive art, which under the protection of the copyright law has made desirable advances and has become a great institution, the art of modern lithography, would be arrested, and its course would be turned backward.

Besides other distinguished artists mentioned in the appendix to this brief as having produced artistic posters, it is well known that the celebrated painter, Sir John Millais, received a large sum, $10,000, for the picture "The Boy and the Soap Bubble,"

which he made to order, as a poster and window advertisement for Pear's soap. Such talent will no longer serve the public in this way, if the view of the courts below is sustained.

When Congress allowed the protection of copyright to artisticly designed labels on cigar boxes and the like, it certainly had no intention of saying that designs for posters should be without copyright protection. Congress does not look to the purpose any further than its laws state. In speaking of "pictorial illustrations or works connected with the fine arts," it meant that these should illustrate the artist's conception of the thing or idea he was seeking to depict. The pleasure of the circus, that institution so dear to the heart of the young American and to many of maturer years, like the pleasure of the theater, is undoubtedly heightened by anticipation created through posters and showbills like those in suit. They do not degrade, but tend to give pleasure,—to cultivate and improve the popular taste and love of the beautiful. Hence they obviously serve a useful purpose, or are intended to do so.

If they succeed in this purpose of pleasing and attracting the public, in however modest a degree, and if they are of such a character as to admit of intellectual and artistic treatment, they are entitled to the protection of copyright.

If there was any doubt about these qualities in the pictures, now before the court, this became a question of fact, which should have been submitted to the jury.

POINT II.

THE DESIGNS WERE PROPERLY COPYRIGHTED.

(A.)

The copyrights were properly taken out by the plaintiffs in their trade names of "*The Courier Co.*" and "*The Courier Litho. Co.*", and the plaintiffs have the right to sue in their individual names for infringement of these copyrights.

A question about this was suggested by the Trial Judge in his remark, made early in the case (Record, page 28):

> "The real controversy will be whether this is a subject of copyright, whether it comes within the copyright law —*it might be whether the proper person has applied for obtaining the copyright.*"

But no such question was raised by defendant's counsel in the motion for peremptory instructions.

The Trial Judge, in his opinion, considered this subject, and stated (page 65):

> "The court, indeed, might have grave doubts whether the Courier Litho. Co., which is a mere trade name of a certain department of the business of the unincorporated association known under the laws of New York as the Courier Company, is or can be the author, inventor, designer or proprietor of any of the things copyrighted within the meaning of Section 4952."

The Trial Judge then proceeded to discuss, to the extent of a page, the question whether any title was shown in the Courier Lithographing Co. as to any of the prints, though he seemed to concede "that *a title would result from the fact that a designer in the employ of the Courier Company designed one, or possibly two, of the pictures;*" and he made a very confused statement of the facts.

The facts are clearly and conclusively shown by the testimony of Mr. Bleistein (quoted on pages 14 and 15, *supra*), that all of the pictures were designed by an artist, Mr. Bandlow, who was in the employ of the Courier Company, and belonged to the Courier Company as proprietor, by the express terms of their contract with this artist,—"What he does produce belongs to us, because we pay for it to him." (Record, page 34, and see also pages 35, 36, 37 and 38.)

But, in conclusion, the Trial Judge said: "The court does not feel called upon to pass definitely upon this question;" and he proceeded to grant the nonsuit upon another and distinct ground, as we have pointed out.

The Circuit Court of Appeals, in its statement of the facts and opinion thereon, paid no attention to these doubts which the Trial Judge had expressed. It stated the facts in the main correctly, and plainly assumed that the pictures were properly copyrighted, as to the time, form and manner of the several copyrights, and that the plaintiffs, as individuals, had the right to sue for infringement of the copyrights; but it held that the pictures lacked the degree of artistic merit and creativeness which, according to its view, the law requires to sustain a copyright.

We quote the facts from the statement made by the Circuit Court of Appeals (page 73), as follows:

> "The plaintiffs sue as members of a joint stock association under the law of New York, known as 'The Courier Company,' but doing a part of their business under the name of the 'Courier Lithographing Company.' Two of the copyrights in question were copyrighted in the name of the 'Courier Company' and one in the name of the 'Courier Lithographing Company,' that known under the title of the 'Statuary Design'."

There is a slight and unimportant error in this statement. The first two pictures, the Ballet and Stirk Family designs,

were copyrighted in the name of "The Courier Litho. Co.": the last one, the Statuary Act, was copyrighted in the name of "The Courier Co." The court continued:

> "The titles of the first two named were deposited with the Librarian of Congress, April 11, 1898. The last was deposited April 18, 1898, though it was in evidence that the *application and title was deposited in the mail, addressed to Librarian of Congress, on April* 15, 1898.
>
> "A large number of prints of each of said designs were shipped April 11, 1898, by the plaintiff company from Buffalo, N. Y., to the agent of the Wallace circus at Peru, Ind., for circulation and distribution. The time of arrival at Peru is not shown."

But it was shown that they were "*due to arrive*" *at Peru, Ind., on April* 15*th*,—"*in order to be in time to go out on their* (*Wallace's*) *advertising car.*" (Record, page 54, and see also pages 39, 40, 48, 50, 53.) This was the very day when the last copyright was surely completed, by depositing the title of the Statuary Act Design in the mail.

From these facts it does not seem that there is anything in the questions suggested by the Trial Court to throw doubt upon the proposition stated at the head of this point, or to require extended discussion.

The Courier Company is an unincorporated joint stock association under the New York statute, known, in its present form, as the *Joint Stock Association Law*, chapter 235 of the laws of 1894.

This law is quoted, in its important provisions, as *Appendix C*, at the end of this brief.

The Courier Lithographing Company is not an independent or distinct organization, but is a mere name under which the Courier Company did a part of its business,—the lithographing branch of the Courier Company. In other words, the Courier Company is a general printing and publishing concern, having

various branches to its business, one of which, the lithographing branch, was for convenience sometimes designated as the Courier Lithographing Co.

The plaintiffs are the members of the unincorporated joint stock association properly known as the Courier Company, but also sometimes known, in one of the branches of its work, as the Courier Lithographing Co. They are properly described in the title of the action as "doing business under the name (or names) of The Courier Co. and The Courier Lithographing Co."; and in the declaration it is properly alleged that they "compose the unincorporated association known as the 'Courier Company' and also known as the 'Courier Lithographing Company'". (Page 3.)

Under the New York statute, the plaintiffs are practically copartners in business. Such associations differ from ordinary copartnerships only in the relation of the members to each other, and principally in the fact that they are not dissolved by the death of a member, if the articles of agreement so provide. As to third parties, the members are copartners, jointly liable for the acts and debts of the concern. These associations are required to file an annual certificate (Joint Stock Association Law, sec. 4); and the proofs are that such certificates were filed by the Courier Company. (Record, page 29.)

Obviously, this action was properly brought by the plaintiffs in their individual names. In fact it could not be brought otherwise, as there is no statute of the United States or of the State of Kentucky, so far as known, which would permit it; and upon ordinary principles the plaintiffs, not being a corporation, could only sue as individuals. There is a statute in New York (Code of Civil Procedure, section 1919, printed at the end of Appendix A, in this brief), which *permits* such an unincorporated association to sue and be sued in the name of its president or treasurer, when it consists of seven or more

persons; but this statute is merely permissive, not mandatory, and it has of course no extra-territorial force.

> "Joint stock companies and unincorporated associations, unless otherwise provided by statute, are treated as, and have all the attributes of, a common partnership, there being no intermediate step between a partnership and a corporation known to the common law."
>
> *Am. & Eng. En. of Law, First Ed., Vol. XVII, p.* 863; *Second Ed., Vol. XVII, pp.* 636, 637, *et seq.*
>
> *Whitehead vs. Allen*, 4 *Abb. Ct. of App. Dec. (N. Y.)* 628.

> "A joint stock company is a partnership with some of the powers of a corporation."
>
> *People ex rel. Winchester vs. Coleman*, 133 *N. Y.* 279, 283, 286.
>
> *Citing Van Aernam vs. Bleistein*, 102 *N. Y.* 360.

Equally plain is it that the plaintiffs as copartners have the right to do business under the name of the "Courier Company" or the "Courier Lithographing Company," or both of these names, and have the right to take out patents and copyrights in these names.

> "A firm may have several names * * * in which case all of the members are equally liable on its contracts * * * under whatever name they may have been made."
>
> *Am. & Eng. En. of Law, First Ed., Vol. XVII, p.* 915; *Second Ed., Vol. XXII, pp.* 79, 80.
>
> *Wright vs. Hooker*, 10 *N. Y.* 51.
>
> *Hunt vs. Semonin*, 79 *Ky.* 270.
>
> *In re Williams, Fed. Cases, No.* 17,707.

The U. S. Revised Statutes, in the first section, provide that "the word '*person*' may extend and be applied to partnerships and corporations."

That copartners in business, who are the proprietors of a copyrighted article, may take out a copyright in either of their copartnership or trade names, is well settled.

Scribner vs. Clark, 50 *Fed. Rep.* 473; *affirmed as*
Belford, Clark & Co., vs. Scribner, 144 *U. S.* 488.
Callaghan vs. Myers, 128 *U. S.* 617.
Scribner vs. Allen Co., 49 *Fed. Rep.* 854.
Werckmeistsr vs. Springer Lith. Co., 63 *Fed. Rep.* 808
Rock vs. Lazarus, Law Rep., 15 *Eq. Cases*, 104.
Weldon vs. Dicks, Law Rep., 10 *Ch. Div.* 247.

The same principle was applied to a patent in *Fruit-Cleaning Co. vs. Fresno Home Packing Co.*, 94 *Fed. Rep.* 845.

Finally, the plaintiffs were the "*proprietor*" of each of the copyrighted prints, and as such were authorized to take out the copyrights by the express language of the copyright law, R. S., sec. 4952, which includes "proprietors" with "authors, inventors (and) designers."

That they were the owners or proprietors of the prints, was shown by Mr. Bleistein's testimony (quoted above, pages 14 and 15; and see pages 34, 35, 36, 37 and 38 of the record); and especially by his clear statement, on page 36:

> "My agreement with Mr. Bandlow is that he was to receive while in our employ $100 a week as designer. He was to furnish us with such designs as we needed, and they were to be our property; for consideration of that he was to receive $100 per week."

Mr. Bleistein testified that Bandlow made all these designs for the plaintiffs under this contract.

> "The literary product of a salaried employee, the result of compilations made in the course of his employment, becomes the property of the employer, who may copyright it."

Colliery Eng. Co. vs. United, etc. Co., 94 *Fed. Rep.* 152.

No formal assignment of the right to a copyright is necessary. *Consent* is sufficient to constitute one the proprietor.

Carte vs. Evans, 27 *Fed. Rep.* 861.
See also, Schumacher vs. Schwencke, 25 *Fed. Rep.* 466.
Little vs. Gould, Fed. Cases, No. 8,395.

And see the luminous opinion of Mr. Justice Clifford in *Lawrence vs. Dana, Fed. Cases, No.* 8,136.

Also *Sweet vs. Benning*, 81 *Eng. Com. Law Rep.* 459; 16 *Com. Bench Rep.* 459; and many other English cases.

The case at bar in this respect is in complete analogy with the doctrine of this court regarding the ownership of patents for inventions, where a man is employed for the purpose of making inventions,—the court holding that any patent taken on them belongs to his employer.

Thus in *Gill vs. United States*, 160 *U. S.*, 426, at page 435, the court said:

> "On the other hand, it is equally clear that if the patentee be employed to invent or devise such improvements, his patents obtained therefor belong to his employer, since in making such improvements he is merely doing what he was hired to do."

These authorities, applied to the proved and undisputed facts, abundantly establish the proposition (A) stated at the head of this point.

(B.)

All of the pictures, and particularly the Statuary Act Design, were copyrighted before publicaton.

No question was raised as to the date of copyright of the Ballet or Stirk Family Design. But defendant's counsel, in his motion for peremptory instructions, claimed that the

Statuary Act was not copyrighted until April 18, 1898, while he said that the publication was before that. His statement is quite erroneous.

The Trial Judge in his opinion got into some confusion on this subject, but did not decide the question. The Court of Appeals paid no attention to it, after stating the facts.

The facts in this connection are stated above (pages 42, 43), under subdivision (A) of this point.

The printed title of this particular design, the Statuary Act, with an application for its copyright, was deposited in the mail addressed to the Librarian of Congress on April 15, 1898. (Record, pages 57, 58; also pages 40, 42, 44.) It was received by the Librarian on April 18, and his certificate of copyright shows the deposit of the title or description on that date. (Record, page 6, pages 27, 28, etc.)

But it also appears that two copies of the print itself were filed in the Librarian's office on April 11. The Librarian himself certifies to the deposit on that date. (Record, end of page 27.) The official catalogue issued by him on April 20, 1898, which was offered in evidence but not received (pages 28, 29), sets forth the copyright of this print as follows:

> "Also 'Statuary Act Design' (1898, No. 24,345, Apr. 18, 2 copies rec'd Apr. 11, 1898)."

This publication, as we submit, was erroneously excluded by the Trial Court; but whether or not it was properly excluded, the fact remains of record that the plaintiffs sent two copies of the prints to the Librarian so that they were received by him on April 11; and that afterwards they sent the printed title or description, with a further application for copyright, on April 15, which was received on April 18.

Under these circumstances we claim that this copyright should *prima facie* be dated at least as early as April 11, when

the two copies of the picture were received by the Librarian. If these copies contained the printed title, then the copyright was complete on April 11; if they did not contain the title, then it might require to be completed by subsequent special deposit of the title. But that was a question of fact which should have been submitted to the jury, and could not be, and was not really, taken as a ground for directing a finding for the defendant. The subsequent filing of the same title would not in any manner affect the validity of the copyright if already duly secured, and the act of the Librarian, in dating it from April 18, when he subsequently received the separate title, cannot be conclusive against the plaintiffs.

Indeed, the copyright does not date from the receipt by the Librarian of either the title of the copyrighted publication, or the two copies. It dates from the day when the plaintiffs *deposited in the mail*, addressed to the Librarian, "*a printed copy of the title of the book* * * * *engraving, cut, print, photograph or chromo*", and *deposited in the mail*, likewise addressed, "*two copies of such copyright book*, * * * *engraving, chromo, cut, print,*" etc. (R. S. Section 4956).

The exclusive right is secured by depositing the articles to be copyrighted, and their title, in the mail. Even though they should be delayed unreasonably in the mail, or should never be received by the Librarian, on and after the day of such deposit, the proprietor has the right to publish and be protected by law.

In this instance the two copies of the prints were sent to the Librarian of Congress some time before April 11, and were received by him on that date; and the separate printed title was mailed to him on April 15. If we are wrong in our suggestion that the protection of this copyright dates from as early as April 11, then it certainly dates from April 15.

There was no publication of this print before April 15; in-

deed, there was no evidence that it was published on that day, or for some time after it.

The statute (section 4956) requires the deposit in the mail to be made "*on or before the day of publication,*" and again "not later than the day of the publication." The publication can safely be made on the day of the mailing.

The evidence already referred to shows that all of these prints, including the Statuary Act, were shipped from Buffalo on April 11, addressed to the agent of the Wallace circus at Peru, Indiana, and "*due to arrive*" there on April 15, "in order to be in time to go out on their (Wallace's) advertising car." (Record, page 54; also pages 39, 40, 48, 50, 53.)

In other words, the prints when they arrived at Peru, Indiana, were not to be opened or distributed to the public; but from there were to be shipped on the advertising car to other points, where they would subsequently be opened and published, in the ordinary course of events.

This surely did not amount to proof of publication of any of these prints before April 15, or even on April 15,—though the publication on April 15 would be consistent with the copyright. It only shows that by April 15 they were to reach one stage in their journey towards their ultimate destination, where they would finally be published.

The law is well settled that there was no publication of these prints when they were shipped from Buffalo on April 11, *or when they were received by Mr. Wallace at Peru, Indiana, on or about April* 15. *There was no publication until they were exposed to the general public, so that the public, without discrimination as to persons, might enjoy them. This must have been some time after April* 15, *when the last copyright was surely completed.*

Publication is a legal conclusion which follows from certain acts.

> "And for a definition of publication, we find it stated in *Drone on Copyright, p.* 291: 'A book is published when

printed copies are sold unconditionally to the public. * * * To constitute a publication it is essential that the work shall be exposed for sale or gratuitously offered to the general public, so that the public, without discrimination as to persons, may enjoy that for which protection is granted. Printing itself cannot amount to a publication, for the obvious reason that a book may be withheld from the public long after it has been printed.'"

Jewelers Merc. Agency vs. Jewelers Pub. Co., 84 *Hun* (*N. Y. Sup. Ct.*) 12, 16.

In *Callaghan vs. Myers*, 128 *U. S.* 617, the court held as to volume 34 of the Illinois Reports, the copyright in which had been completed on the day of publication, that the presumption was that the copyright was completed prior to the publication, using these words:

"In the absence of evidence to the contrary, which it was open to the defendants to introduce, *it must be presumed that the deposit of the title was made in each case before publication.* * * * *It must be presumed*, in the absence of evidence to the contrary, *that the deposit of the title preceded the publication* and that the delivery of the copies to the Secretary of State preceded the deposit of the work in the clerk's office. Where the three things are prescribed by the statute to be done in consecutive order, and all three appear to have been on the same day, it will be presumed that the statute was complied with, leaving the *prima facie* evidence open to be rebutted."

Where a publisher announced in advance the date on which a book would be published, and three days prior thereto shipped copies of the work to dealers, together with instructions that the same were not to be sold or in any way offered to the public until the given day; in the absence of proof to the contrary, *it is to be presumed that publication did not take place prior to the date fixed.*

Black vs. Henry G. Allen Co., 56 *Fed. Rep.* 764.

In *Belford, Clarke & Co. vs. Scribner*, 144 *U. S.* 488, and in *Garland vs. Gemmill*, 14 *Canada Sup. Ct. Rep.* 321, it was held that the deposit of copies in the office of the Librarian of Congress, or the Minister of Agriculture, before copyright had been secured, did not constitute a publication; the court saying that the argument to the contrary was "ingenious, but fallacious."

In *Prince Albert vs. Strange*, 2 *De Gex & Smale*, 652; 1 *Macnaghten & Gordon*, 47 *Eng. Ch. Rep.* 25, it was held that where a printer had been employed to take a few impressions, and some of them had been distributed to the personal friends of the author, the rest being kept in private apartments, this did not constitute a publication.

The representation of a play upon the stage regularly at a theater, does not constitute a publication.

Thompkins vs. Halleck, 133 *Mass.* 32.
Palmer vs. De Witt, 47 *N. Y.* 532.
Boucicault vs. Hart, Fed. Cases, No. 1692.

The use by a teacher of his manuscript and allowing pupils to make copies for the purpose of obtaining his instruction, does not amount to a publication.

Bartlett vs. Crittenden, Fed. Cases, Nos. 1076 *and* 1082.

The printing of copies of an operetta and distributing them to artists, for private use only in learning their parts, and the representing of the operetta on the stage, is not a publication.

French vs. Kreling, 63 *Fed. Rep.* 621.

See also:

Reed vs. Carusi, Fed. Cases, No. 11642.
Blume vs. Spear, 30 *Fed. Rep.* 629.
Exch. Tel. Co. vs. Cent. News, Law Rep. 2 *Ch. Div.* 48.

POINT III.

The Trial Court erred in the rejection of certain evidence offered by the plaintiffs and specified in the Assignment of Errors.

(Record, pages 79 and 80.)

The Assignment of Errors points out clearly the nature of the evidence which was excluded, with references to the record. We respectfully urge that each of these exceptions to the exclusion of evidence was well taken, and should be considered by this court as sufficient ground for reversal.

But in view of the more vital questions involved in the case, we shall not occupy the time of the court with any elaboration of these questions of evidence. The errors involved are too plain to require argument.

POINT IV.

In view of the fact that the Circuit Court took this case from the jury and directed a nonsuit, the real question, and perhaps the only question for discussion on this appeal, is whether on their face the copyrighted pictures are proper subjects of copyright.

If this was in doubt, it was a question for the jury, and to the jury it should have been sent.

We respectfully submit that the judgments of the Circuit Court and the Circuit Court of Appeals should be reversed, and the case remitted to the Circuit Court for the District of Kentucky, for a new trial, with proper instructions upon all the foregoing points.

October Term, 1902.

ARTHUR VON BRIESEN AND
ANSLEY WILCOX,
Of Counsel for Plaintiffs in Error.

WILCOX & MINER,
Attorneys for Plaintiffs in Error,
816 Ellicott Square, Buffalo, N. Y.

APPENDIX.

APPENDIX A, referred to in page 10.

Added to Brief for Plaintiffs in Error,
in Bleistein and others vs. Donaldson Lithograph Co.

Quotations from book entitled "*Picture Posters,*"
by Charles Hiatt, published by George Bell & Sons, London, 1895.

"CHAPTER I.—*The Story of the Pictorial Poster.*

"It would be merely foolish to pretend that the pictorial poster, looked at from the point of view of art, is of the same importance as a portrait by Velasquez or an etching by Rembrandt. Its æsthetic qualities have of necessity to be subordinated to its commercial qualities; the artist is the servant of the tradesman. His first business is not to achieve a decoration, but to call the attention of the man in the street to the merits of an article. He may be fantastic only in so far as his fantasy assists the advertisement; he must ever keep before his eyes the narrow object of his effort. The closest limits are set to his invention; it is not for him to do what he will, but rather to do what he must. Under such circumstances, it is, at the first blush, somewhat surprising that artists have condescended to the poster at all. The bounds of freedom in the cases of painting and of sculpture are, comparatively speaking, so wide that one is not unnaturally amazed that the artist of talent is willing to work within the strict limitations imposed on him in the production of a pictorial poster.

"And yet, after all, to the ingenious designer there is a certain fascination in the very strictness of these limits; the complexity of the problem allures him, and gives him the appetite for experiment. Moreover, if he believe that art is something more than a vague grace, a non-essential luxury, he is ever anxious to extend her domain, to make

her empire universal. He believes it to be his mission to touch some ugly necessity, to inform it with art, and, in doing so, to adorn it. He is restless for new worlds to conquer, for fresh fields to occupy. His ideal is art everywhere, art in all. He would fain give style and grace even to the paraphernalia of commerce; the necessities of trade shall not be hideous if he can make them otherwise. And so it happens that he is willing, nay, eager, to turn his attention to the poster, with the result that the boarding becomes an interesting, even a charming, gallery of designs. What was one of the most hideous of human inventions is transformed into a delight to the eyes. Color and interest are added to the street; the gay and joyous take the place of the dull and ugly.

"It follows, supposing that I have stated the case fairly, that it is not derogatory to the dignity, even of a very great artist, to apply his talent to the poster.

"It is clear that the poster is one of the oldest and most obvious forms of advertisement. It is almost impossible to conceive a time in the history of man, once he had learned to express his thoughts in design or in writing, when the idea of the thing did not exist. It must have been an incident of the most crude and ancient of civilizations; even the cave-dweller in the dim and distant past must surely have possessed the essential idea of it. From the cave-dweller to the comparatively complex civilization of the ancient and greater Egypt is a far cry. That the mural inscription, which is obviously the germ of the poster, flourished exceedingly in the land of the Pharaohs is matter of history. A papyrus is comprised in the collections of the Louvre, which may fairly be described as a poster. It is dated so early as 146 B. C., and deals at length with the escape of two slaves from the city of Alexandria, offering a reward to anybody who should discover their place of retreat. Still more interesting, though less ancient, is an inscription in Greek, discovered in the Temple at Jerusalem, in 1872, by M. Clermont-Gannerau. It was issued during the reign of Herod the Great, and forbids the entry, by foreigners, to certain parts of the Temple on pain of death."

* * * * * * *

"CHAPTER II.—*The Pictorial Poster in France during the Present Century.*

"As we have seen, the idea of the poster, and even of the pictorial poster, is an extremely ancient one, but it is only at the commencement of the present century that distinguished designers deliberately attempted to make the pictorial poster a work of art. The few posters, at once pictorial and artistic, which are of earlier date than the time in question, are artistic by accident rather than by deliberate intention. So early, however, as the year 1836, we find a really distinguished French artist, Lalance, producing a poster."

A design for a poster somewhat similar to the "Stirk Family Design" will be found on page 83 of Mr. Hiatt's book. A ballet poster embodying the same idea with our "Spectacular Ballet Design", but quite differently worked out, will be found on page 35 of that book. These are selected by the author as specimens of good posters.

Among the names of well-known artists mentioned in this work as having produced posters for use as artistic advertisements, we select a few as follows:

French: Cheret, Grasset, Toulouse-Lautrec, Willette, and many others.

English: Fred Walker, Walter Crane, Prof. Herkomer, H. Stacy Marks, E. J. Poynter, Sir James Linton, Aubrey Beardsley, Charles Ffoulkes, Sir John Millais.

American: Edward Penfield, Louis J. Rhead, W. H. Bradley, Francis Day, H. McCarter, Kenyon Cox, Edwin A. Abbey.

In the book published by Scribners, entitled "The Modern Poster", are many reproductions of show-bills of undoubted artistic merit. Thus, on page 80, the theatrical poster for

"Rip Van Winkle", on page 81 that for "Uncle Tom's Cabin", on page 83 that for "Jefferson in 'Fighting Bob'", on page 88 the poster advertising the play known as "Hoyt's 'A Milk White Flag'", the circus poster on page 90, and many others, show the high development of pictorial art represented in the modern poster in this and other countries which has been encouraged by the copyright law.

Sir John Millais' poster, "The Boy and the Soap Bubble", advertising Pear's soap, is copied on page 42 of the Scribner book.

APPENDIX B, referred to in pages 29, 30.

Added to Brief for Plaintiffs in Error,

in Bleistein and others vs. Donaldson Lithograph Co.

"BLACK CROOK" CASES.

In our brief, pages 29 and 30, arguing that there was at least a question of fact for the jury upon the artistic merit and value of the plaintiffs' three designs, we quoted from *Hegeman vs. Springer*, tried before Judge Lacombe in 1899, and affirmed by the Circuit Court of Appeals, Second Circuit, in 110 *Fed. Rep. page* 374.

This case involved the copyright of a show-bill illustrating a scene from the "Black Crook", a spectacular theatrical show, in many respects like our Ballet design. *Judge Lacombe submitted to the jury the question of fact whether this poster was a proper subject of copyright.*

His entire charge to the jury is printed below.

We did not think it worth while, in the body of the brief, to distinguish the case of *Martinetti vs. Maguire, Fed. Cases, No.* 9173, which was much relied on by our opponents in the Circuit Court of Appeals; but which neither of the courts below cited

in its opinion. That was also a "Black Crook" case, decided in 1867, by Judge Deady, in California. All such spectacles as the "Black Crook" were then new to the American public, and to the judicial mind. Judge Deady discussed the moral tendencies of this show,—whether it was "suited to public representation", and seemed inclined to condemn it in moderate terms.

But the actual holding in that case was that the "Black Crook" was not, within the meaning of the copyright law, a "*dramatic composition*,"—it was not a drama, but a mere spectacle; and that it was not copyrightable as a "dramatic composition."

This was not a copyright of a picture or design, but of an alleged "dramatic composition." It, therefore, had little or no resemblance to the copyrights of designs involved in the case at bar. But the copyrighted "Black Crook" *picture*, which was sustained in *Hegeman vs. Springer*, was in all essential respects like our designs.

COPY OF JUDGE LACOMBE'S CHARGE in *Hegeman vs. Springer*.

> "The Court: Gentlemen of the jury, this is an action under the federal statutes, to recover certain sheets, which, if the plaintiff is right in his contention, have been forfeited to him; and also to recover a penalty of one dollar for each and every print or impression found in the possession of the defendant. Usually in these actions the one question that the jury has to deal with is whether the print which is found in the possession of the defendant is or is not an infringement of the plaintiff's copyright. That question is entirely eliminated from this case. Exhibit D, which is the lower of the two pictures before you, is an exact duplication not only of the prints which were found in the defendant's shop, but also of the print which the plaintiff copyrighted. Apparently the impressions which were inclosed in the envelope and sent to Washington, and the impressions which were found in the defendant's warehouse, of which the lower picture is one, were all printed from the same stone. That question is out of this case.

"I further charge you that from the testimony here it appears that the plaintiff took the requisite steps which the statute requires him to take in order to secure a copyright for a particular lithographic design, print or composition, which he sent down to Washington, to wit, Exhibit D, the lower of those two.

"In fact, the only real question in the case for you to pass upon is whether Exhibit D was a proper subject of copyright; that is, whether it was in a proper sense the production of the plaintiff, whether it was a novelty, whether it was a creation.

"It does not mean necessarily that the plaintiff must have been the sole intellectual genius that composed and devised it. He himself working with men whom he employed to assist him for that purpose, if he succeeds in bringing out a work of original design, of merit, more or less artistic in its character, will be entitled to a copyright.

"It is not the single individual only, or the artist alone, who is entitled to the copyright; it is the proprietor, the owner, as well as the artist.

"The story of the plaintiff is, and it is not contradicted, that, desiring a lithograph of this sort as a species of advertisement for shop windows, side walls and where all, of the 'Black Crook' Company, he instructed his artist to prepare a sketch, and revised the sketch himself—a sketch intended to represent the ballet of that piece; that he gave to the artist a photograph of Stalacta, the woman who represents the part of the Queen of the Fairies—an actual photograph of a woman who was then appearing in one of the companies, and in the costume in which she was then appearing, and told him to put that on one side of the picture, and to put Mephistopheles on the other side, and between the two to put in what the witness described as 'two premieres and a large ballet'; to get up the design, and the artist did so. That is what you see before you, Exhibit D. There is evidence here before you, abundant evidence, that prior to that time Exhibit 1 was in existence and was well known by the plaintiff; and indeed you will perceive that Exhibit 1 has the figure of Stalacta on the side, also taken from the same photograph, the figures being identical.

"It is apparent, without any discussion or pointing out, that aside from the representation of Stalacta there are a great many differences between those two compositions.

It is a question which will be for you to determine, whether or not, having before him a photograph of the Stalacta, having before him this Exhibit 1 of which he knew before—you may even take into consideration that he had before him Exhibit 2—an artist may be said to have produced an original composition when he produced Exhibit D. Of course in disposing of that question you are to take all the circumstances into consideration. Necessarily an artist is somewhat circumscribed as to what he is to produce, when he is instructed to compose something which shall indicate the presence of a ballet upon the stage; of course under those circumstances he does not paint sheep in a meadow or a man fishing off a bridge; and when you come to variations in display of the ballet, there are of course variations of the faces of the women, of their forms also to a greater or less extent possibly, and of their postures and their drapery, and of the background; and that is about all.

"Looking at those pictures before you, you are to say, looking at it from a sensible and reasonable point of view, whether the artist who was given the problem has really composed something new, artistically, in the lower of those productions there, Exhibit D. If he has, the mere circumstance that the one figure in it, that of Stalacta, is borrowed, and that he is not entitled to any copyright for that, would not destroy the value of the rest of his composition. He could not maintain a copyright action against anybody who copied the figure of Stalacta, because he had no right to copyright the figure of Stalacta by itself; but the mere insertion of that figure there as part of the original composition would not prejudice his right to a copyright for such composition. But in order to obtain such copyright he must have produced something new; his work as a whole must be an original composition and an original treatment of the subject. It will be for you to determine that question.

"If you determine that question in the affirmative, the only other question that remains for you to decide is as to what the damages are. I do not know of any other question in this case. There is no other defense that I know of. There were found in the room or shop of the defendants 1,440 copies in black and white and 635 copies colored. If you find that Exhibit D is a proper subject of copyright, I do not see how you can escape the conclusion that the black

and white, which is a reproduction exactly of it, without the colors, is an infringement. However, it will be a question for you to determine whether it is or is not an infringement of the copyrighted picture. If you find that it is, you will then find a verdict in favor of the plaintiff for $2,075, besides the sheets. Of this recovery of course you will understand the United States gets a half.

"You are dealing with the question not as a question of compensation to the owner of the copyright for what he may have lost. This is a quasi penal statute. The United States has made a law, and has forbidden the violation of that law, and has inflicted a penalty for its transgression. You have no scope, you have no choice in the matter. The only damages which you can give are the damages which the statute says you may give, and without any limitation whatever one way or the other; without any opportunity, I mean, of shifting the amount one way or the other. You must give one dollar for each sheet that is found there. The Government will take half and the plaintiff the other half.

"If, then, you reach the conclusion that this is an original composition, and that therefore the copyright communication which the plaintiff sent on to Washington really gave him a copyright—and reach the conclusion that the black and white reproduction was an infringement, as the 635 colored reproductions undoubtedly are—your verdict will be for the sheets and $2,075. On the other hand, if you reach the conclusion that there is no originality in Exhibit D, and that it was not a subject for a copyright, your verdict will be for the defendants."

The jury found for plaintiff. On writ of error to the Circuit Court of Appeals, the judgment was affirmed (119 *Fed. Rep., page* 374), the court using this language:

"The principal question of fact raised upon the trial related to the artistic quality of the production, which was submitted to the jury in a manner with which the plaintiff in error was apparently satisfied, and to which no exception was taken, and about which no question now properly arises."

APPENDIX C, referred to in page 43.

Added to Brief for Plaintiffs in Error,
in Bleistein and others vs. Donaldson Lithograph Co.

THE JOINT STOCK ASSOCIATION LAW,

of the State of New York.

(Laws of 1894, Chapter 235).

"An Act in relation to joint stock associations, constituting chapter forty-five of the general laws," as amended.

Short title.

Section 1. This chapter shall be known as the joint stock association law.

Definitions.

Sec. 2. As used in this chapter, the term joint stock association includes every unincorporated joint stock association, company or enterprise having written articles of association and capital stock divided into shares, but does not include a corporation; and the term stockholder includes every member of such an association.

Contents of articles of association.

Sec. 3. The articles of association of a joint stock association may:

1. Provide that the death of a stockholder thereof or the transfer of his shares of stock therein, shall not work a dissolution of the association.

2. Prescribe the number of its directors, not less than three, to have the sole management of its affairs.

3. Contain any other provision for the management of its affairs, not inconsistent with law.

Certificate to be filed within sixty days and annually thereafter; penalty; evidence.

Sec. 4. Every joint stock association transacting business within this state shall, within sixty days after its formation, and in each January thereafter, file with the secretary of state, and with the clerk of the county in which its principal business is carried on, a written certificate, signed and verified by its president and treasurer, stating the name and date of organization of such association, the number of its stockholders, the names and places of residence of its officers, and its principal place of business. Such certificates shall be recorded in such offices respectively. Any such certificate, the record thereof, or a certified copy of such certificate or record, shall be presumptive evidence of the truth of all facts therein stated, against such association, its officers and stockholders. The officers of a joint stock association who fail to comply with the provisions of this section shall be jointly and severally liable to pay to the people of this state a penalty of fifty dollars for each day such failure continues.

Dissolution:

Sec. 5. A joint stock association shall not be dissolved except in pursuance of its articles of association, or by consent of all its stockholders, or by judgment of a court for fraud in its management, or for good cause shown.

Power to take and convey real property.

Sec. 6. A joint stock association in the name of its president, as such president, may purchase, take, hold and convey such real property only,—

1. As may be necessary for its immediate accommodation in the convenient transaction of its business.

2. As may be mortgaged to it in good faith by way of security for loans made by or moneys due to it.

3. As it may purchase at sales under judgments, decrees or mortgages held by it.

Changing articles of association.

Sec. 7. (This section need not be quoted.)

When officer or stockholder not privileged from testifying.

Sec. 8. (This section need not be quoted.)

Laws repealed.

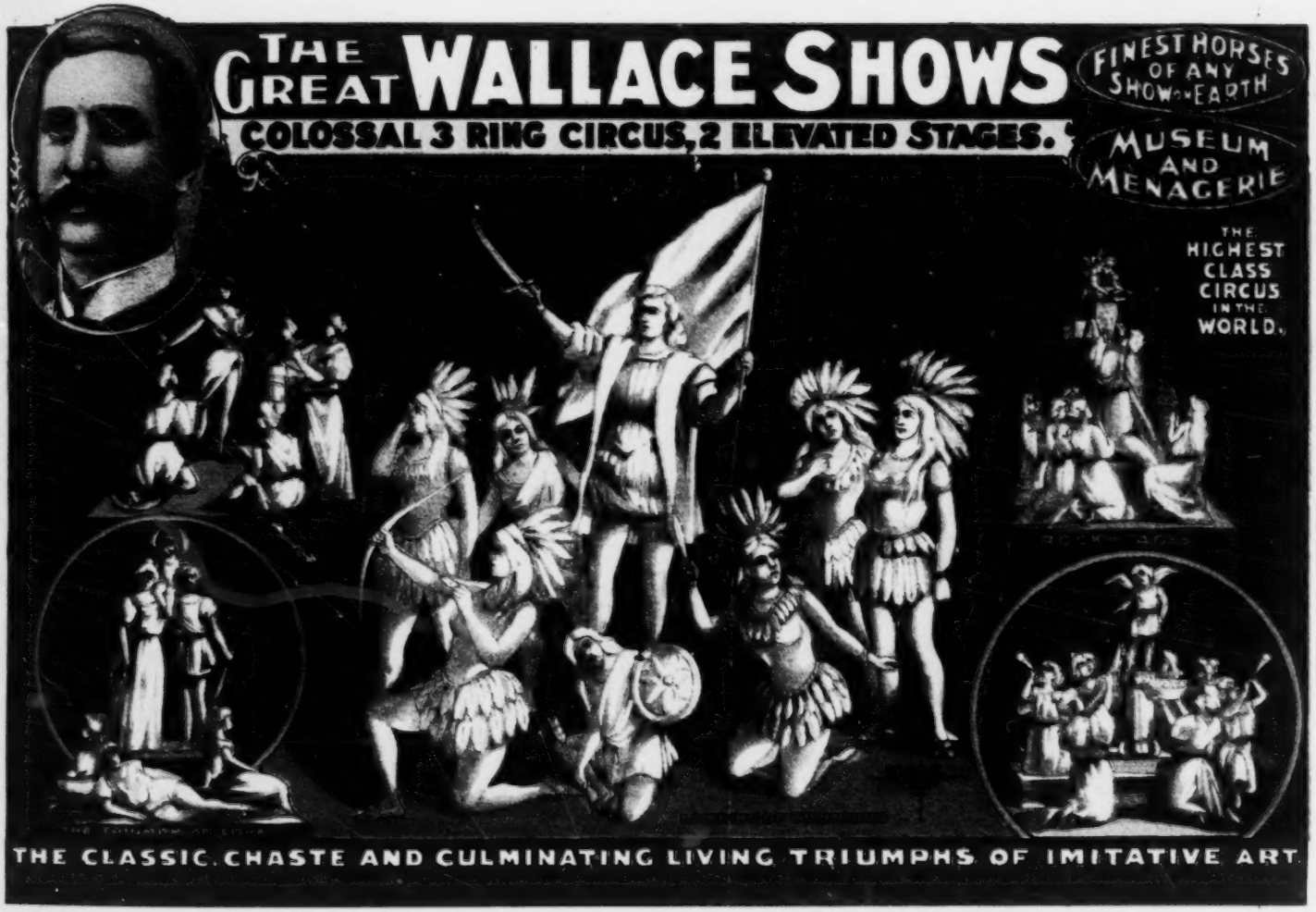
Sec. 9. (This section need not be quoted.)

Sec. 10. This act shall take effect immediately.

Relative to actions, et cetera, by or against associations of seven or more persons.

Sec. 1919. An action or special proceeding may be maintained, by the president or treasurer of an unincorporated association, consisting of seven or more persons, to recover any property, or upon any cause of action, for or upon which all the associates may maintain such an action or special proceeding, by reason of their interest or ownership therein, either jointly or in common. An action may likewise be maintained by such president or treasurer to recover from one or more members of such association his or their proportionate share of any moneys lawfully expended by such association for the benefit of such associates, or to enforce any lawful claim of such association against such member or members. An action or special proceeding may be maintained, against the president or treasurer of such an association, to recover any property, or upon any cause of action, for or upon which the plaintiff may maintain such an action or special proceeding, against all the associates, by reason of their interest or ownership, or claim of ownership therein, either jointly or in common, or their liability therefor, either jointly or severally. Any partnership, or other company of persons, which has a president or treasurer, is deemed an association within the meaning of this section.

(Code of Civil Procedure, Sec. 1919, as amended by L. 1900, ch. 184.)


THE GREAT WALLACE SHOWS
COLOSSAL 3 RING CIRCUS, 2 ELEVATED STAGES.
FINEST HORSES OF ANY SHOW ON EARTH
MUSEUM AND MENAGERIE
THE HIGHEST CLASS CIRCUS IN THE WORLD.
THE CLASSIC, CHASTE AND CULMINATING LIVING TRIUMPHS OF IMITATIVE ART

THE GREAT WALLACE SHOWS
COLOSSAL 3 RING CIRCUS, 2 ELEVATED STAGES.
FINEST HORSES OF ANY SHOW ON EARTH
MUSEUM AND MENAGERIE
THE HIGHEST CLASS CIRCUS IN THE WORLD
STIRK FAMILY
THE RENOWNED STIRK FAMILY.

THE GREAT WALLACE SHOWS
FINEST HORSES OF ANY SHOW ON EARTH
COLOSSAL 3 RING CIRCUS, 2 ELEVATED STAGES.
MUSEUM AND MENAGERIE
THE HIGHEST CLASS CIRCUS IN THE WORLD.
GREAT WALLACE SHOWS GRAND SPECTACULAR BALLET COSTUMED & PRESENTED EXACTLY AS IN GRAND OPERA, LED BY THE CELEBRATED SISTERS MACCARI, HULDA, ADELE & AMELIA PREMIERE DANSEUSES, A TREMENDOUS SENSATION COSTING A FORTUNE TO PRODUCE

No. 117.

The Robert Clarke Company, Printers.

Office Supreme Court
FILED
DEC 3 1902
JAMES H. McKENNEY,
Clerk

Brf. of Kittredge & Wilby for Def.

Supreme Court of the United States.

OCTOBER TERM, 1902.

Filed Dec. 3, 1902.

No. 117.

Error to the United States Circuit Court of Appeals for the Sixth Circuit.

George Bleistein, et al.,
Plaintiffs in Error,

vs.

The Donaldson Lithographing Company,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

EDMUND W. KITTREDGE,
For Defendant in Error.

E. W. KITTREDGE,
JOSEPH WILBY,
Of Counsel.

The Robert Clarke Company, Printers. *December, 1902.*

Supreme Court of the United States.

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Error to the United States Circuit Court of Appeals for the Sixth Circuit.

George Bleistein, et al.,
Plaintiffs in Error,

vs.

The Donaldson Lithographing Company,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

I conceive that much of the argument in the brief for the plaintiffs in error is not founded on the record in the case.

This was an action by the plaintiffs in error, based upon Section 4965 of the Revised Statutes of the United States, as amended by the acts of March 3, 1891, and March 2, 1895, to recover the sum of one dollar each as a penalty for the publication of 23,795 sheets in the nature of programmes of performances to take place at the circus of B. E. Wallace.

The petition alleged that these sheets were infringements of the plaintiffs' copyrights in three different lithographic prints, copyrighted under the following titles:

(1) Spectacular Ballet Design;
(2) The Stirk Family Design; and
(3) Statutary Act Design.

The defendant answered, pleading the general issue under Section 4969 of the Revised Statutes of the United States.

At the trial in the Circuit Court, on the conclusion of the evidence for the plaintiffs, the Court instructed the jury to return a verdict for the defendant.

The evidence established that these three prints were ordered by B. E. Wallace, proprietor of the circus known as the "Wallace Shows," as advertising matter for that show.

Mr. Bleistein, one of the plaintiffs, testified as follows (R., p. 30.)

"Q. Mr. Bleistein, those three pictures that have been introduced, who were they made for?

A. They were sold to Mr. Wallace.

Q. They were made, were they not, under contract with Mr. Wallace for them?

A. Yes, practically so.

Q. They were made under a contract with them and for them. Did you make the contract?

A. I don't remember that I made that specific one, the year that these were printed in.

Q. Who did represent the joint-stock company in making that contract?

A. Either Mr. John A. Rudolf or myself.

Q. Can't you tell whether it was yourself?

A. I am not positive. Some years Mr. Rudolf did. I rather think Mr. Rudolf did.

Q. The Wallace Company is a circus company, is it not?

A. Mr. B. E. Wallace, yes, owns the Wallace Show.

Q. Known as the 'Wallace Show,' and this was made under contract with them as an advertisement of their show, was n't it?

A. Yes.

Q. Never has been made for anybody else, has it?

A. Not up to the present time that I know of.

Q. That 's what I am asking about. And where was this contract made with Mr. Wallace?

A. I think it was made in Peru, Indiana, where he lives.

Q. Where Mr. Wallace lives? That is true in reference to each of those papers?

A. Yes.

Q. What you have said about the one I have been showing to you—which was the Ballet picture—is true as to each of them?

A. Yes, sir.

Q. That is to say, they were made for Mr. Wallace under contract with him as an advertisement for his show, and they have never been made for anybody else?

A. Not up to the present time."

Mr. Bleistein, it thus appears, did not make the contract with Mr. Wallace; and any testimony that he undertook to give in regard to it was hearsay. This testimony was elicited in an examination by the trial judge, during which the witness, who had no personal knowledge of the contract with Mr. Wallace, was permitted to testify to a usage or custom of the Courier Lithographing Company in all its contracts to reserve to itself the rights of design which they put in copyright; and he claimed, under this usage, that if Mr. Wallace ceased to use these pictures, that is to say, did not do the statuary act, etc., that then the plaintiffs would have a right to sell these pictures to other people who might want to use them for their shows.

There was not a word of testimony offered to show that Mr. Wallace had any knowledge of such usage or custom of the Courier Company, or that any reservation of such right entered into the contract with him for furnishing him with these posters. All of these pictures purported to be representations of acts to be done in the Wallace Shows, and all were made under a representation by Wallace, expressed on the face of the pictures, that his show was going to do these things. All these posters contain reading matter indicating that these were pictures of acts to be done in the Wallace Shows, and they all included pictures of Mr. Wallace himself.

This same witness testified or admitted (R., p. 37) that Mr. Wallace furnished his own picture and the reading matter which was part of the picture claimed to be copyrighted, and that each of these pictures was a representation of what the Wallace Circus professed to exhibit to the public, and that he gave the Courier Company the descriptions of

these scenes to enable them to execute the prints for that purpose.

The copyrights were taken under the act of Congress of June 18, 1874, which I print in full, italicizing the clauses to which I wish particularly to direct the attention of the Court (p. 78):

> "An act to amend the law relating to patents, trade marks, and copyrights.
>
> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title page or the page immediately following, if it be a book; or if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model or design intended to be perfected and completed as a work of the fine arts, by inscribing upon some visible portion thereof, or of the substance on which the same shall be mounted, the following words, viz: 'Entered according to act of Congress, in the year ——, by A. B., in the office of the Librarian of Congress, at Washington; *or, at his option the word 'Copyright,' together with the year the copyright was entered, and the name of the party by whom it was taken out; thus—'Copyright*, 18—, *by A. B.*'
>
> Sec. 2. That for recording and certifying any instrument of writing for the assignment of a copyright, the Librarian of Congress shall receive from the persons to whom the service is rendered, one dollar; and for every copy of an assignment, one dollar; said fee to cover, in either case, a certificate of the record, under seal of the Librarian of Congress; and all fees so received shall be paid into the Treasury of the United States.
>
> Sec. 3. *That in the construction of this act, the words 'Engraving,' 'cut,' and 'print,' shall be applied only to pictorial illustrations or works connected with the fine arts*, and no prints or labels designed to be used for any other articles of manufacture shall be entered under the copyright law, but may be registered in the Patent Office. And the Commissioner of Patents is hereby charged with the supervision and control of the entry or registry of such prints or labels, in conformity with the regulations provided by law as to copyright of

prints, except that there shall be paid for recording the title of any print or label not a trade mark, six dollars, which shall cover the expense of furnishing a copy of the record under the seal of the Commissioner of Patents, to the party entering the same.

Sec. 4. That all laws and parts of laws inconsistent with the foregoing provisions be and the same are hereby repealed.

Sec. 5. That this act shall take effect on and after the first day of August, eighteen hundred and seventy-four."

Approved June 18th, 1874.

The petition alleged in respect to each of these prints that the plaintiffs "designed and engraved a lithographic print, cut or engraving, styled Spectacular Ballet Design," and it contained no allegation that the print, cut or engraving was a "pictorial illustration or work connected with the fine arts." There was no allegation that these pictures were chromos or chromo-lithographs, and there was no proof given at the trial that these pictures were chromos or chromo-lithographs.

Our learned adversary, coming to the consideration of this law of June 18, 1874, says upon page 34 of his brief: "We might well argue that the pictures involved in this case, which are chromos, are not covered by the provisions of this statute." This was the claim of our learned adversary in the Circuit Court of Appeals, and a large portion of his brief in this court is devoted to a discussion of chromos, how they are made, and their merits as pictures, for the purpose of showing that they are not "prints, cuts or engravings," within the meaning of the act of June 18, 1874.

But there are several difficulties in the way of this contention. In the first place these prints, in the inscription upon them which was essential to their validity and any right of action for the infringement of them, was in pursuance of the last clause of the first section of the act of 1874. Thus, upon each picture:

"Copyright, 1898, Courier Litho. Co., Buffalo, N. Y."

But for the provision in the first clause of this act this inscription would have been fatal to the plaintiffs' right of action, under the decision of this court in *Thompson* v. *Hub-*

bard, 131 U. S. 123. The inscription prescribed by Section 4962 of the Revised Statutes was otherwise indispensable to the maintenance of an action for the infringement of a copyright. The notice given on each one of these pictures was that authorized by this act of June 18, 1874. Having thus availed themselves of the provisions of this act, clearly the plaintiffs are not in position to claim that the pictures are not covered by its provisions. Again, if these pictures were chromos, and not prints, cuts or engravings, then under the allegations of the petition they were not admissible in evidence because they were not in support of the allegations of the petition.

However, in the case of *Yuengling* v. *Schile*, 12 Fed. Rep. 107, chromo-lithographs are defined and distinguished from lithographic prints, and it is held that both chromos and lithographic prints are included in the more general term "prints," and are subject to the provision of the statutes applicable to prints in general.

Our adversary, in this court, does not propose to stand upon the proposition that these prints are chromos and therefore are not covered by the provisions of this statute, and he finds it necessary to discuss the proper construction of the language of the statute. He does this by claiming that the words "pictorial illustrations" are to be taken independently of and disconnected from the words that follow, and that Congress has thereby provided for the protection of prints, which are pictorial illustrations, without limitation. But how is it possible to construe this language of the statute by disconnecting the words "pictorial illustrations" from the remainder of the clause? The language is "pictorial illustrations or works connected with the fine arts." There is no comma or other punctuation after the word "illustrations," as printed in the 18th Statutes at Large, page 79; and while this may not be of great significance, it renders the grammatical construction consistent with what the court below held to be the obvious intent of Congress, that these words were to be applied only to "pictorial illustrations or works (the latter word being only an amplification of the former) connected with the fine arts."

Every "engraving," "cut" or "print" is in some sense a pictorial illustration of something. That is as true of cuts

or prints to be used as advertisements of articles of manufacture as of cuts or prints of advertisements of a circus. To say, as our adversary in effect does, that cuts or prints are made the subject of copyright without limitation, would be practically to annul the first clause of the provision of this section of this statute in question.

Our adversary practically asserts that all of the language of this statute relating to the construction of the words "engraving," "cut" or "print" has no force or effect whatever. Since if the first paragraph of Section three, instead of reading as it does, commenced with the third line of the Section and read as follows: "No prints or labels designed to be used for any other article of manufacture shall be entered under the copyright law, but may be registered in the Patent Office," this statute would have all of the force that our adversary gives to it. It is idle, as it seems to me, to say that the first clause of this section was only intended to distinguish ordinary prints or labels to be used for any other articles of manufacture from other pictorial illustrations, and it would be equally difficult to find a reason why prints designed to be used for articles of manufacture any more than prints designed to advertise such scenes for a circus shall not be entered under the copyright law.

This court recently held in the case of *Bolles* v. *Outing Company*, 175 U. S., p. 262, that the statute being penal, if the language is ambiguous the court will lean more strongly in favor of the defendant than it would if the statute were remedial. Mr. Justice Brown, delivering the opinion, said:

> "This is an action to recover a penalty of one dollar for every copy of the plaintiff's photograph, and is based upon Revised Statutes, section 4965, which declares that any person offending against its provisions 'shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported or exposed for sale, . . . one-half thereof to the proprietor and the other half to the use of the United States.' This is clearly a penal statute in that it fixes a single and arbitrary measure of recompense to the plaintiff, irrespective of the damages actually

> sustained by him, or of the profits realized by the defendant; and in the further provision that one-half of the amount recovered shall be to the use of the United States. It makes no pretense of awarding damages, and simply imposes a forfeiture of a specified sum. . . . The penal character of the act is further emphasized by the fact that the plaintiff apparently recovers a moiety for the use of the United States, though perhaps this is not beyond a doubt suggested in *Thornton* v. *Schreiber*, 124 U. S. 612. . . . The statute, then, being penal, must be construed with such strictness as to carefully safeguard the rights of the defendant and at the same time preserve the obvious intention of the legislature. If the language be plain, it will be construed as it reads, and the words of the statute given their full meaning; if ambiguous, the court will lean more strongly in favor of the defendant than it would if the statute were remedial."

It is difficult to see how there is any ambiguity in the provision of the statute in question, in the language which declares that "in the construction of this act, the words 'engraving,' 'cut' and 'print' shall be applied only to pictorial illustrations or works connected with the fine arts." And when our adversary says (Br. 34) that, "the truth is that this statute does not furnish any basis or test whatever for deciding whether a picture is copyrightable, and was not intended to do so," it is difficult for me to understand his meaning. In every case that has been decided since the passage of the act, so far as I have been able to find, this language of the statute has been held to be a limitation upon the right to copyright prints, cuts or engravings. Thus, in the case of *Rosenbach* v. *Dreyfuss*, 2 Fed. Rep. 217, the court, Choate, J., lays down two propositions pertinent to the case at bar. At page 224, he says:

> "The complaint must state a case for recovery with reasonable certainty, and in case of doubt a pleading must be taken most strongly against the pleader. It is not enough that the defendant may be liable if the facts stated are true, it must appear that he is liable."

And on page 222:

> "As to prints, in addition to what has been said, it is only necessary to refer to the statute of June 18, 1874. . . . The third section provides that, 'In the construction of this act the words "engraving," "cut" and "print" shall be applied only to pictorial illustrations or works connected with the fine acts.'"

The opinion in the above case refers to the case in 9 Weekly Digest (N. Y.), 340, decided by Judge Blodgett, under a similar statute, where the court say:

> "This being a highly penal statute, it was the duty of the pleader in making a case under it, to negative all presumptions in favor of the innocence of the defendant."

In *Ehret* v. *Pierce*, 10 Fed. Rep. 554 (also reported in 18 Blatchford, 302), which was a case of a color card intended to represent different shades of paint, the court say:

> "True, it has lithographic work upon it, and also words and sentences; but it has none of the characteristics of a work of art or of a literary production. It is an advertisement, and nothing more."

In *Schumacher* v. *Wogram*, 35 Fed. Rep. 210, the plaintiff designed a picture representing a young woman holding a bouquet of flowers, to be printed on labels for cigar boxes, which he attempted to copyright, and Wallace, J., says:

> "The facts show an attempted evasion by the plaintiffs of the provisions of Section 3 of the Act of Congress of June 18, 1874, 'To amend the law relating to patents, trade-marks and copyrights.' That section declares in substance that no prints or labels designed to be used for any article of manufacture can be copyrighted, but authorizes them to be registered and protected as trade-marks in proper cases. If the experiment of the plaintiffs can succeed, this statute is inoperative whenever the prints or labels contain a pictorial illustration; and it could be wholly nullified by the device of printing pictures on the labels."

Our adversary, in quoting the different paragraphs of the opinion of Judge Lurton, of the Circuit Court of Appeals, it seems to me does not do justice to that opinion.

The opinion, however, is printed in full in the record, and in 104 Fed. Rep., at page 994. The learned judge quoted from the decision of this court in *Higgins* v. *Keuffel*, 140 U. S. 428. In this latter case the question arose in reference to a label which the plaintiff claimed to have copyrighted under the act of Congress in question, of June 18, 1874. In the course of the opinion the court says, at page 434:

> "The act of June 18, 1874, changes the previous law in some respects. . . . It also declares that the words 'engraving,' 'cut' and 'print' shall be applied only to pictorial illustrations or works connected with the fine arts; and also that no prints or labels designed to be used for any other articles of manufacture shall be entered under the copyright law, but may be registered in the patent office."

It was held in England, in the case of *Cobbett* v. *Woodward*, L. R. 14 Eq., 407, which arose upon a claim of copyright for a catalogue of furniture containing many pictorial illustrations of furniture and decorations, that, as it was intended as an advertisement, and not as a work of art, it was not entitled to protection under the copyright law. Our adversaries, upon page 36 of their brief, cite later English cases in which the decision in *Cobbett* v. *Woodward* is thought to have been limited in its scope. But this court cited the case of *Cobbett* v. *Woodward* with approval, and without any apparent disposition to limit its scope, in *Baker* v. *Selden*, 101 U. S., 106. The opinion in this latter case, delivered by Mr. Justice Bradley, contains so much in respect to the principles underlying this subject that is pertinent to the case at bar, that I cannot forbear quoting from it at some length:

> "The remarks of Mr. Justice Thompson in the Circuit Court in *Clayton* v. *Stone & Hall* (2 Paine, 392), in which copyright was claimed in a daily price-current, are apposite and instructive. He says: 'In determining the true construction to be given to the act of Congress, it is proper to look at the Constitution of the United States, to aid us in ascertaining the nature of the property intended to be protected. "Congress shall have power to promote the progress of science and useful arts, by securing for limited

times to authors and inventors the exclusive right to their writings and discoveries." The act in question was passed in execution of the power here given, and the object, therefore, was the promotion of science; and it would certainly be a pretty extraordinary view of the sciences to consider a daily or weekly publication of the state of the market as falling within any class of them. They are of a more fixed, permanent, and durable character. The term "science" cannot, with any propriety, be applied to a work of so fluctuating and fugitive a form as that of a newspaper or price-current, the subject-matter of which is daily changing, and is of mere temporary use. The title of the act of Congress is, "for the encouragement of learning," and was not intended for the encouragement of mere industry, unconnected with learning and the sciences. . . . We are, accordingly, of opinion that the paper in question is not a book the copyright to which can be secured under the act of Congress.'

"The case of *Cobbett* v. *Woodward* (Law Rep. 14 Eq. 407), was a claim to copyright in a catalogue of furniture which the publisher had on sale in his establishment, illustrated with many drawings of furniture and decorations. The defendants, being dealers in the same business, published a similar book, and copied many of the plaintiff's drawings, though it was shown that they had for sale the articles represented thereby. The court held that these drawings were not subjects of copyright. Lord Romilly, M. R., said: 'This is a mere advertisement for the sale of particular articles which any one might imitate, and any one might advertise for sale. If a man not being a vendor of any of the articles in question were to publish a work for the purpose of informing the public of what was the most convenient species of articles for household furniture, or the most graceful species of decorations for articles of home furniture, what they ought to cost, and where they might be bought, and were to illustrate his work with designs of each article he described—such a work as this could not be pirated with impunity, and the attempt to do so would be stopped by the injunction of the Court of Chancery; yet if it were done with no such object, but solely for the purpose of advertising particular articles for sale, and promoting the private trade of the publisher by the sale of articles which any other person might sell as well as the first advertiser, and if in fact it contained little more than an illustrated inventory of the con-

> tents of a warehouse, I know of no law which, while it would not prevent the second advertiser from selling the same articles, would prevent him from using the same advertisement; provided he did not in such advertisement by any device suggest that he was selling the works and designs of the first advertiser.'"

In Mott Iron Works v. *Clow*, 82 Fed. Rep., referred to below, at page 320, the court, after discussing the difference between the English statutes and our own, and the cases which, under the English statute, were held to limit the authority of *Cobbett* v. *Woodward*, say:

> "The ruling of the English court is therefore not pertinent, except as it illustrates the subject. It is further to be said that the case of *Cobbett* v. *Woodward*, overruled by the case of *Maple & Co.* v. *Junior Army and Navy Stores*, has been expressly approved and quoted at length by the Supreme Court of the United States."

The decision of the Circuit Court in this case of *Mott Iron Works Co.* v. *Clow*, is reported in 72 Fed. Rep. 168. The construction of the statute now under consideration by that court was given apparently without hesitation. The action was upon a copyright of advertising sheets containing a description of porcelain baths, which also contained cuts or prints of such baths, with ornamental settings; and the court, in determining upon a demurrer whether such cuts or prints were a proper subject-matter of copyright, say, Grosscup, J.:

> "The cuts or prints shown in complainant's sheets, in connection with their ornamental settings, may have such artistic merit as would support a copyright if offered as a work of fine art. The statutes, as amended by the act of 1874, *limit the right of copyright to such cuts and prints as are connected with the fine arts.* But the bill does not show that the author or designer intended or contemplated these cuts or prints as works of fine art. No copyright was asked upon them separately from the advertising sheet of which they are a part. They are not offered to the public as illustrations or works connected with the fine arts, but are adjuncts simply to a publication connected with a useful art. The court will not supply an intention that the author or designer has not avowed, or give to

> the cuts or prints a character and purpose different from what their surroundings indicate." Demurrer sustained.

In this case upon appeal to the Circuit Court of Appeals for the Seventh Circuit, 82 Fed. Rep. 316, the court, referring to the cuts or prints in the illustrated catalogue, say (p. 318):

> "In brief, they are mere advertisements of the appellant's wares, with nice cuts or illustrations of the goods accompanying and forming part of the advertisement, as an allurement to customers. The question, therefore, which confronts us, is, were such things intended to be protected by the constitutional provision in question?"

This is followed by a general discussion of the constitutional provision and of the act of Congress, which is concluded by the following language referring to the case of *Higgins* v. *Kueffel*, cited by our adversaries (p. 321.)

> "In the latter case of *Higgins* v. *Kueffel*, 140 U. S. 428, the court observes that the provision of the constitution 'evidently has reference only to such writings and discoveries as are the result of intellectual labor;' and, 'to be entitled to a copyright, the article must have by itself some value as a composition, at least to the extent of serving some useful purpose other than as a mere advertisement or designation of the subject to which it is attached.' So far as the decisions of the Supreme Court have gone, we think they hold to the proposition that mere advertisements, whether by letterpress or by picture, are not within the protection of the copyright law. It is possibly not beyond comprehension that pictures of slop sinks, wash bowls, and bath tubs, with or without letterpress statement of dimensions and prices, though intended mainly for advertisement, may, in localities where such conveniences are not in common use, be the means of instruction and advancement in knowledge of the arts, and, when they are the product of original, intellectual thought, may possibly come within the scope of the constitutional provision. It is enough for the present purpose to say that, in our judgment, Congress has not seen fit to enact a law which can reasonably be given so broad a construction."

Judge Lurton, delivering the opinion of the Court below in the case at bar, after recapitulating certain facts disclosed by the evidence, and citing cases to which we have referred, states that the court found it necessary to pass upon only one of the points presented in the case, which was the matter I have so far endeavored to discuss. He said, in closing:

> "What we hold is this, that if a chromo, lithograph or other print, engraving or picture has no other use than that of a mere advertisement, and no value aside from this function, it would not be promotive of the useful arts, within the meaning of the constitutional provision to protect the 'author' in the exclusive use thereof, and the copyright statute should not be construed as including such a publication if any other construction is admissible. If a mere label simply designating or describing an article to which it is attached, and which has no value separated from the article, does not come within the constitutional clause upon the subject of copyright, it must follow that a pictorial illustration designed and useful only as an advertisement, and having no intrinsic value other than its function as an advertisment, must be equally without the obvious meaning of the Constitution. It must have some connection with the fine arts to give it intrinsic value, and that it shall have is the meaning which we attach to the act of June 18, 1874, amending the provisions of the copyright law.
>
> "We are unable to discover anything useful or meritorious in the design copyrighted by the plaintiffs in error other than as an advertisement of acts to be done or exhibited to the public in Wallace's Show. No evidence aside from the deductions which are to be drawn from the prints themselves was offered to show that these designs had any original artistic qualities. The jury could not reasonably have found merit or value aside from the purely business object of advertising a show, and the instruction to find for the defendant was not error."

II.

The petition alleged that the plaintiffs, under the name of the "Courier Lithographing Company" or the "Courier Company," designed and engraved each lithographic print, cut or engraving which was the subject-matter of the action. That is to say, the petition alleged that the plaintiffs themselves were the authors of these lithographic prints. There is no pretense that there was any evidence offered tending to show that the plaintiffs themselves, or either of them, were the authors of these prints. It was claimed that they were the proprietors because, as they also claimed, the design or conception was that of their employes, working for them, under a salary, and that their designs were the property of the employer.

It was incumbent upon the plaintiff to allege and prove who was the author, inventor or designer of the prints in question. If they were not themselves the authors, then it was incumbent upon them to allege how they acquired title as proprietors from the author, inventor or designer. The petition having alleged that they themselves were the authors, issue was joined upon that allegation, and even if it had been proved that these prints had been designed by employes of the plaintiffs, who were paid by the plaintiffs, under an express or implied contract that their designs should become the property of the plaintiffs, nevertheless this would have been a fatal variance. No issue was presented as to their having acquired title by contract from those who were in fact the authors, inventors or designers. The importance of this failure of proof to support the allegation of the petition is illustrated by the decision of this court in the case of *Lithographic Co.* v. *Sarony*, 111 U. S. 53. Mr. Justice Miller, in delivering the opinion in that case, says on p. 59:

> "In regard to the kindred subject of patents for invention, they cannot by law be issued to the inventor until the novelty, the utility, and the actual discovery or invention by the claimant have been established by proof before the Commissioner of Patents; and when

he has secured such a patent, and undertakes to obtain redress for a violation of his right in a court of law, the question of invention, of novelty, of originality, is always open to examination. Our copyright system has no such provision for previous examination by a proper tribunal as to the originality of the book, map, or other matter offered for copyright. A deposit of two copies of the article or work with the Librarian of Congress, with the name of the author and its title page, is all that is necessary to secure a copyright. It is, therefore, much more important that when the supposed author sues for a violation of his copyright, the existence of those facts of originality, of intellectual production, of thought, and conception on the part of the author, should be proved, than in the case of a patent right.

. . . . . .

The question here presented is one of first impression under our Constitution, but an instructive case of the same class is that of *Nottage* v. *Jackson*, 11 Q. B. D. 627, decided in that court on appeal, August, 1883.

The first section of the act of 25 and 26 Victoria, chap. 68, authorizes the *author* of a photograph, upon making registry of it under the copyright act of 1882, to have a monopoly of its reproduction and multiplication during the life of the author.

The plaintiffs in that case described themselves as the authors of the photograph which was pirated, in the registration of it. It appeared that they had arranged with the captain of the Australian cricketers to take a photograph of the whole team in a group; and they sent one of the artists in their employ from London to some country town to do it.

The question in the case was whether the plaintiffs, who owned the establishment in London, where the photographs were made from the negative and were sold, and who had the negative taken by one of their men, were the authors, or the man who, for their benefit, took the negative. It was held that the latter was the author, and the action failed, because plaintiffs had described themselves as authors.

Brett, M. R., said, in regard to who was the author: 'The nearest I can come to, is that it is the person who effectively is as near as he can be, the cause of the picture which is produced, that is, the person who has superintended the arrangement, who has actually formed the picture by putting the persons in position,

and arranging the place where the people are to be—the man who is the effective cause of that.'

"Lord Justice Cotton said: 'In my opinion "author" involves originating, making, producing, as the inventive or master mind, the thing which is to be protected, whether it be a drawing, or a painting, or a photograph.'"

The author of a picture is the man who has superintended the arrangement, who has actually formed the picture by putting the people into position, and arranging the place in which the people are to be. "To constitute one an author, he must, by his own intellectual labor, applied to the materials of his composition, produce an arrangement or compilation new in itself." *Atwell* v. *Ferret*, 2 Blatch. 46.

The author, inventor or designer, to be entitled to a copyright, must be both the person who invented the arrangement and who gave it visible form by representing it. *Bimms* v. *Woodworth*, 4 Wash. C. C. Rep. 48.

I claim that upon the allegations of this petition the defendant was not put upon inquiry as to whether the plaintiffs' employes were, within the meaning of the law, the designers of these pictures. If the plaintiffs failed to prove their title as they alleged it, the defendant was entitled to a verdict.

The Circuit Court of Appeals declared that (R. 74):

> "There was no evidence touching the originality of any of these designs other than the general statement of one of the plaintiffs that Mr. Wallace represented that these acts were to be done in his show, and that the designs as copyrighted were the 'creations of our employes.'"

The trial judge, who heard the evidence, declared that the Courier Lithographing Company

> "Is certainly not the author, inventor or designer of the things copyrighted, and how it, under the circumstances, can be the proprietor of it, is not clear to the court."

The learned counsel for the plaintiff in error takes issue with the finding of the court below, and asserts that the original designer of these pictures had been clearly proven, in sweeping terms, by the plaintiffs' first witness, Mr. Bleistein (Br. 14). It will certainly require a more careful analy-

sis of the evidence than is contained in the plaintiff's brief, to induce this court to disregard the finding of the courts below. When the court examines the testimony of this witness Bleistein, on pages 36 and 37, it will be seen that all the witness knew of his own knowledge in regard to the design of these pictures was that he saw a Mr. Bandlow, an employe, working on the ballet picture; and he thereupon proceeded to admit that Mr. Wallace, the proprietor of the Wallace Show, employed the plaintiffs, under a contract, to get up these prints as "special paper" to represent scenes or attitudes or groups, which they, the Wallace Circus Company, and nobody else, proposed to exhibit as a part of their show. They were, upon their face, advertisements of Wallace's Circus, and were and could be of no possible use to anybody else. Each one of these pictures was a representation of what the Wallace Circus Company professed to exhibit to the public, and it was so declared upon the face of the pictures. They were all made under a representation by Mr. Wallace that he was going to do these things, and that he wished these acts, as he described them, represented on colored bills, for exhibition, as advertisements for his show. All the bills contained reading matter that these were acts to be done in Wallace's Circus, and included the pictures of Mr. Wallace himself, furnished by him. Copies of the pictures deposited with the Librarian of Congress included this reading matter and the picture of Mr. Wallace. The pictures seized and put in evidence as proof of infringement, show, upon their face, that they were programmes or show bills made for Mr. Wallace, for the Wallace Show. The copyrighted pictures are what is styled "special paper"—that is, they were show bills made especially for him. And Mr. Bleistein admitted that so long as Mr. Wallace continued to use them, the plaintiffs had no right to manufacture them for or to sell them to anybody else. He claimed, however, that if Mr. Wallace "ceases to use that bill, say he does not do the statuary act next year, we have a right to sell the design to other people who may want to use that sort of thing."

If an engraving is executed for pay, or for a valuable consideration, for a particular person, as an advertisement of his property or exhibition, surely the copyright belongs to that person, under any implication growing out of the

contract of employment under which the work is executed. An inchoate right to a copyright may be transferred by parol prior to the taking of the copyright. The legal right to a copyright may remain in the proprietor, while the beneficial interest, to the extent which is agreed upon, may be in another party.

Black v. *Allen Co.*, 42 Fed. Rep. 618; s. c., 56 Fed. Rep. 764.

In the case of the *Press Pub. Co.* v. *Falk*, 59 Fed. Rep. 324, the court say, at page 325:

> "When a person has a negative taken and photographs made, for pay, in the usual course, the work is done for the person so procuring it to be done, and the negative, so far as it is a picture, or capable of producing pictures, of that person, and all photographs so made from it, belong to that person; and neither the artist nor any one else has any right to make pictures from the negative, or to copy the photographs, if not otherwise published, for any one else. *Pollard* v. *Photograph Co.*, 40 Ch. Div. 345; *Moore* v. *Rugg*, 46 N. W. 141."

The case cited, of *Pollard* v. *Photograph Co.*, distinctly holds that when a photograph is made for a person, for a price paid by him, he is entitled to the copyright of it, if it be a proper subject to copyright.

In the case of *Dielman* v. *White*, 102 Fed. Rep. 892, the plaintiff accepted and executed a commission to furnish and deliver two mosaic panels from designs to be made by him. After he had painted the cartoons from which the panels were made, he copyrighted the same, and then he brought the action against the defendant, who took photographs of the mosaics after they were in place, for infringement of his copyright. The Court, in deciding the case, say at page 894:

> "Taken by itself, the contract seems to me plainly inconsistent with any reservation of copyright on the part of the artist. In general, when an artist is commissioned to execute a work of art not in existence at the time the commission is given, the burden of proving that he retains a copyright in the work of art executed, sold, and delivered under the commission rests heavily

> upon the artist himself. If a patron gives a commission to an artist, there appears to me a very strong implication that the work of art commissioned is to belong unreservedly and without limitation to the patron. It is not necessary to decide if the artist retains the right to make for another a replica. Reproduction by the artist may be a question of artistic ethics rather than of law; but that the patron has a right to make and permit, to any extent, reproductions of the work of art sold to him, appears to me plain, unless the contrary is plainly set out in the contract."

And the Court cites *Parton* v. *Prang*, 3 Clifford, 537, in support of this ruling.

In the case of *Little* v. *Good*, 2 Blatch., 166, an officer was authorized to prepare for publication reports of decisions, and to provide for publishing the same, and to take a copyright of the reports in his name. Under a contract with a printer that in consideration that he would print the book of reports, he should, for five years, have the exclusive benefit of the copyright to be taken in the name of the officer, as proprietor, it was held that the copyright was held in trust by the officer, as proprietor, for the printer, who was entitled to the benefit of it, and had a perfect equitable title to it during the period of five years.

Now, assuming, for the sake of the present argument, that these pictures in this case were the proper subject-matter of copyright; and that Mr. Wallace, for a sufficient consideration, contracted with the plaintiffs that they should design and print for him the three boxes of pictures that were shipped to him on April 11, 1898, for use as advertisements, representing the scenes to be exhibited in his show, and if that was the whole contract, then under these decisions the plaintiffs had no right to take a copyright of them, or either of them. The pictures, in that event, belonged unreservedly and without limitation to Mr. Wallace. But if the plaintiffs, by the express terms of the contract, retained a right to copyright these pictures, the burden of proving which "rested heavily" upon them; and if it was also a part of the contract that as long as Mr. Wallace continued to do these acts in his show, and to use these posters in advertising them, the plain-

tiffs had no right, and reserved none, to publish and sell these prints to other people, then during that period the plaintiffs held the copyright in trust for the sole use and benefit of Mr. Wallace, who had a perfect right to make and permit, to any extent, reproductions of these prints in the programmes of his circus; just as in the case of *Little* v. *Good*, the printer during the term of five years had the sole right to print and publish the reports which were the subject-matter of copyright in that case for the term of five years. These sheets that were seized in the possession of the defendant were, upon their face, manifestly made for Mr. Wallace for use by him to distribute among people whom he wished to patronize his show.

In view of the law as thus established, there is no aspect of the evidence in this case which presented a state of facts entitling the plaintiffs to maintain this action; and the instruction by the trial court to render a verdict for the defendant was right.

III.

The petition alleged that the print called the "Statuary Act Design" was deposited under the statute to complete the copyright, on the 18th of April, 1898. (R., p. 6.) There was no allegation in the petition that this picture was deposited in the mail, addressed to the Librarian, prior to that date, or that any steps were taken by the plaintiffs prior to that date to secure a copyright upon it. The evidence shows that a large number of copies of this "Statuary Act Design" were shipped from Buffalo on April 11, 1898, addressed to the agent of the Wallace Shows, at Peru, Indiana; our adversary adds, "*due to arrive there on April 15th.*" He would thus imply that the ordinary time of transit from Buffalo to Peru would have brought them to Mr. Wallace on April 15th. But this was not the testimony. The testimony is simply that according to the plaintiffs' contract with Mr. Wallace, they were under obligations to deliver this picture to Mr. Wallace on or before April 15, 1898.

I need not dwell further upon this part of the case; but I wish to say that my learned adversary seems to argue that

if the defendant did not demur to the petition, it could not object to the absence of allegations of essential facts at the trial of the case; and, further, that if the proof offered was fatally at variance with the allegations of the plaintiffs' title as contained in the petition, it did not affect the plaintiffs' right to have the case submitted to the jury on such evidence, and that without amendment of or application to amend the petition.

I can only say that I do not so understand the law applicable to this subject. On the contrary, I claim that it is incumbent upon the plaintiffs, in a case like this, for the recovery of penalties, to allege and to prove as alleged, every fact essential to the validity of their copyright. As was said by this court in *Jones* v. *Van Zandt*, 5 How, 372:

> "It is admitted that this prosecution being a penal one, the declaration must bring it within the statute clearly, whether looking to its language or spirit. Dwarris on Statutes, 736; 5 Dane's Abr. 244, sec. 8; Simmon's case, 4 Wash. C. C. 397. It is not necessary to multiply authorities on so elementary a proposition."

IV.

In regard to the question whether either of these pictures, and especially the Ballet Act Design, are immoral in their tendency, and therefore are not subjects of copyright, I ask the court to look at the original pictures, which are not printed in the record, but will be before the court. The trial judge said (Rec., p. 64):

> "That the picture which represents a dozen or more figures of women in tights, with bare arms, and with much of the shoulders displayed, and by means of which it is designed to lure men to a circus, is in any sense a work of the fine arts, or are pictorial illustrations in the sense of the statute, I do not believe. The court does not think that it was in any wise intended by Congress that such a picture should be the subject of the exclusive advantages given by the privilege of copyrighting. Instead of being either useful art, or fine art, it is something to be regarded

as merely frivolous, and to some extent immoral in tendency."

That the copyright law does not protect what is immoral in its tendency is abundantly settled. A print representing unchaste acts or scenes calculated to excite lustful or sensual desires in those whose minds are open to such influences, and to attract them to witness the performance of such scenes, is manifestly of that character. It is the young and immature and those who are sensually inclined who are liable to be influenced by such scenes and representations, and it is their influence upon such persons that should be considered in determining their character.

In *Broder* v. *Zeno Maucais Music Co.*, 88 Fed. Rep. 74, at 79, the Court, describing the character of immorality that rendered a song not the subject of copyright, said that:

"It had an indelicate and vulgar meaning,"

And, therefore, was not the subject of protection by the copyright law.

The Supreme Court, in *Dunlop* v. *United States*, 165 U. S. 501, say:

"The true test of what constitutes obscene literature is that which tends to deprave the morals by exciting sensual desires and lascivious thoughts."

The act for the protection of dramatic compositions is *in pari materia*, and the same considerations applicable to it, in so far as this question is concerned, we submit, are applicable to the case at bar.

The case of the Black Crook (*Martinetti* v. *Maguire*, Fed. Cases, No. 9173), is quite on a par with the case at bar.

In view of the facts disclosed by the evidence, and of the authorities to which I have referred, I claim:

1. That the statute limits the right of copyright to such cuts, prints or engravings as are connected with the fine arts.

2. That the petition does not allege that these prints were designed or contemplated by the author as connected with the fine arts.

3. That no copyright was asked upon them separately from the advertising sheet of which they are a part.

4. That they were not offered to the public as illustrations or works connected with the fine arts.

5. In brief, that they are, upon their face, mere advertisements and scenes to be exhibited in Mr. Wallace's shows, and were not entitled to copyright under the law.

6. That the plaintiffs were not the authors of these prints, or either of them, as their petition alleged.

7. That the plaintiffs had no title to these copyrights; and if they had, it was in trust for the sole use and benefit of Mr. B. E. Wallace, who was entitled to permit and procure the printing by the defendant of the sheets offered in evidence.

I submit that the judgment of the court below should be affirmed.

EDMUND W. KITTREDGE,
Counsel for Defendant in Error.

Supreme Court of the United States

No. 117.—October Term, 1902.

George Bleistein, John W. Bridgman, John A. Rudolph, Ansley Wilcox, Gerritt B. Lansing and Edwin Fleming, doing business under the name of The Courier Company and The Courier Lithographing Company, Plaintiffs in Error, *vs.* The Donaldson Lithographing Company.	In error to the United States Circuit Court of Appeals for the Sixth Circuit.

[February 2, 1903.]

Mr. Justice Holmes delivered the opinion of the Court.

This case comes here from the United States Circuit Court of Appeals for the Sixth Circuit by writ of error. Act of March 3, 1891, c. 517, § 6, 26 Stat. 828. It is an action brought by the plaintiffs in error to recover the penalties prescribed for infringements of copyrights. Rev. Stat. §§ 4952, 4956, 4965, amended by Act of March 3, 1891, c. 565, 26 Stat. 1109, and Act of March 2, 1895, 28 Stat. 965. The alleged infringments consisted in the copying in reduced form of three chromolithographs prepared by employees of the plaintiffs for advertisements of a circus owned by one Wallace. Each of the three contained a portrait of Wallace in the corner and lettering bearing some slight relation to the scheme of decoration, indicating the subject of the design and the fact that the reality was to be seen at the circus. One of the designs was of an ordinary ballet, one of a number of men and women, described as the Stirk family, performing on bicycles, and one of groups of men and women whitened to represent statues. The Circuit Court directed a verdict for the defendant on the ground that the chromolithographs were not within the protection of the copyright law, and this ruling was sustained by the Circuit Court of Appeals. *Courier Lithographing Co.* v. *Donaldson Lithographing Co.*, 104 Fed. Rep. 993.

There was evidence warranting the inference that the designs belonged to the plaintiffs, they having been produced by persons employed and paid by the plaintiffs in their establishment to make those very things. *Gill* v. *United States*, 160 U. S. 426, 435; *Colliery Engineer Company* v. *United Correspondence Schools Company*, 94 Fed. Rep. 152; *Carte* v. *Evans*, 27 Fed. Rep. 861. It fairly might be found also that the copyrights were taken out in the proper names. One of them was taken out in the name of the Courier Company and the other two in the names of the Courier

Lithographing Company. The former was the name of an unincorporated joint stock association formed under the laws of New York, Laws of 1894, c. 235, and made up of the plaintiffs, the other a trade variant on that name. *Scribner* v. *Clark*, 50 Fed. Rep. 473, 474, 475; *S. C.*, *sub nom.* *Belford* v. *Scribner*, 144 U. S. 488.

Finally, there was evidence that the pictures were copyrighted before publication. There may be a question whether the use by the defendant for Wallace was not lawful within the terms of the contract with Wallace, or a more general one as to what rights the plaintiffs reserved. But we cannot pass upon these questions as matter of law; they will be for the jury when the case is tried again, and therefore we come at once to the ground of decision in the courts below. That ground was not found in any variance between pleading and proof, such as was put forward in argument, but in the nature and purpose of the designs.

We shall do no more than mention the suggestion that painting and engraving unless for a mechanical end are not among the useful arts, the progress of which Congress is empowered by the Constitution to promote. The Constitution does not limit the useful to that which satisfies immediate bodily needs. *Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U. S. 53. It is obvious also that the plaintiff's case is not affected by the fact, if it be one, that the pictures represent actual groups—visible things. They seem from the testimony to have been composed from hints or description, not from sight of a performance. But even if they had been drawn from the life, that fact would not deprive them of protection. The opposite proposition would mean that a portrait by Velasquez or Whistler was common property because others might try their hand on the same face. Others are free to copy the original. They are not free to copy the copy. *Blunt* v. *Patten*, 2 Paine, 397, 400. See *Kelly* v. *Morris*, L. R. 1 Eq. 697; *Morris* v. *Wright*, L. R. 5 Ch. 279. The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act.

If there is a restriction it is not to be found in the limited pretensions of these particular works. The least pretentious picture has more originality in it than directories and the like, which may be copyrighted. Drone, Copyright, 153. See *Henderson* v. *Tompkins*, 60 Fed. Rep. 758, 765. The amount of training required for humbler efforts than those before us is well indicated by Ruskin. "If any young person, after being taught what is, in polite circles, called 'drawing,' will try to copy the commonest piece of real *work*,—suppose a lithograph on the title page of a new opera air, or a woodcut in the cheapest illustrated newspaper of the day—they

will find themselves entirely beaten." Elements of Drawing, first ed. 3. There is no reason to doubt that these prints in their *ensemble* and in all their details, in their design and particular combinations of figures, lines and colors, are the original work of the plaintiffs' designer. If it be necessary, there is express testimony to that effect. It would be pressing the defendant's right to the verge, if not beyond, to leave the question of originality to the jury upon the evidence in this case, as was done in *Hegeman* v. *Springer*, 110 Fed. Rep. 374.

We assume that the construction of Rev. Stat. § 4952, allowing a copyright to the "author, designer, or proprietor . . . of any engraving, cut, print . . . [or] chromo" is affected by the act of 1874, c. 301, § 3, 18 Stat. 78, 79. That section provides that "in the construction of this act the words 'engraving,' 'cut' and 'print' shall be applied only to pictorial illustrations or works connected with the fine arts." We see no reason for taking the words "connected with the fine arts" as qualifying anything except the word "works," but it would not change our decision if we should assume further that they also qualified "pictorial illustrations," as the defendant contends.

These chromolithographs are "pictorial illustrations." The word "illustrations" does not mean that they must illustrate the text of a book, and that the etchings of Rembrandt or ~~Steinla's~~ Müller's engraving of the Madonna di San Sisto could not be protected to-day if any man were able to produce them. Again, the act however construed, does not mean that ordinary posters are not good enough to be considered within its scope. The antithesis to "illustrations or works connected with the fine arts" is not works of little merit or of humble degree, or illustrations addressed to the less educated classes; it is "prints or labels designed to be used for any other articles of manufacture." Certainly works are not the less connected with the fine arts because their pictorial quality attracts the crowd and therefore gives them a real use—if use means to increase trade and to help to make money. A picture is none the less a picture and none the less a subject of copyright that it is used for an advertisement. And if pictures may be used to advertise soap, or the theatre, or monthly magazines, as they are, they may be used to advertise a circus. Of course, the ballet is as legitimate a subject for illustration as any other. A rule cannot be laid down that would excommunicate the paintings of Degas.

Finally, the special adaptation of these pictures to the advertisement of the Wallace shows does not prevent a copyright. That may be a circumstance for the jury to consider in determining the extent of Mr. Wallace's rights, but it is not a bar. Moreover, on the evidence, such prints are used by less pretentious exhibitions when those for whom they were prepared have given them up.

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustra-

tions, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change. That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiffs' rights. See *Henderson* v. *Tomkins*, 60 Fed. Rep. 758, 765. We are of opinion that there was evidence that the plaintiffs have rights entitled to the protection of the law.

The judgment of the Circuit Court of Appeals is reversed; the judgment of the Circuit Court is also reversed and the cause remanded to that court with directions to set aside the verdict and grant a new trial.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 117.—October Term, 1902.

George Bleistein, John W. Bridgman, John A. Rudolph, Ansley Wilcox, Gerritt B. Lansing and Edwin Fleming, doing business under the name of The Courier Company and The Courier Lithographing Company, Plaintiffs in Error, vs. The Donaldson Lithographing Company.

In error to the United States Circuit Court of Appeals for the Sixth Circuit.

[February 2d 1903.]

Mr. Justice Harlan dissenting.

Judges Lurton, Day and Severens, of the Circuit Court of Appeals, concurred in affirming the judgment of the District Court. Their views were thus expressed in an opinion delivered by Judge Lurton: "What we hold is this: That if a chromo, lithograph, or other print, engraving or picture has no other use than that of a mere advertisement, and no value aside from this function, it would not be promotive of the useful arts, within the meaning of the constitutional provision, to protect the author in the exclusive use thereof, and the copyright statute should not be construed as including such a publication, if any other construction is admissible. If a mere label simply designating or describing an article to which it is attached, and which has no value separated from the article, does not come within the constitutional clause upon the subject of copyright, it must follow that a pictorial illustration designed and useful only as an advertisement, and having no intrinsic value other than its function as an advertisement, must be equally without the obvious meaning of the Constitution. It must have some connection with the fine arts to give it intrinsic value, and that it shall have is the meaning which we attach to the act of June 18th 1874, amending the provisions of the copyright law. We are unable to discover anything useful or meritorious in the design copyrighted by the plaintiffs in error other than as an advertisement of acts to be done or exhibited to the public in Wallace's show. No evidence, aside from the deductions which are to be drawn from the prints themselves, was offered to show that these designs had any original artistic qualities. The jury could not reasonably have found merit or value aside from the purely business object of advertising a show, and the instruction to find for the defendant was not error. Many other points have been urged as justifying

the result reached in the court below. We find it unnecessary to express any opinion upon them, in view of the conclusion already announced. The judgment must be affirmed." *Courier Lithographing Co.* v. *Donaldson Lithographing Co.*, 104 *Fed. Rep.* 993, 996.

I entirely concur in these views, and therefore dissent from the opinion and judgment of this court. The clause of the Constitution giving Congress power to promote the progress of science and useful arts, by securing for limited terms to authors and inventors the exclusive right to their respective works and discoveries, does not, as I think, embrace a mere advertisement of a circus.

Mr. Justice McKenna authorizes me to say that he also dissents.

True copy.

Test:

Clerk Supreme Court, U. S.

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